Supreme Court, U.S.
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In The

Supreme Court Of The United States

OCTOBER TERM, 1994

TOWN OF SMITHTOWN and JAMES DOWLIING,

Petitioners,

-against-

ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that the respondents, each of the respondents, had a "substantive due process" protected "property right" with respect to a permit which had been sought from the petitioner Town of Smithtown by a third-party, a public water authority, in order for the authority to be able to open up the Town-owned street in front of respondents' home and thus be able to provide new water supply service to the respondents, and in further holding that the petitioner Dowling, the Town's Superintendent of Highways, had violated such "substantive due process protected property right" of the respondents when he delayed the issuance to the authority of that permit?

2. Did the district court err in holding that the respondents had a "substantive due process protected property right" in their expectation of receiving new public water supply service?

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5. Did the court of appeals err in holding that petitioners were not entitled to an evidentiary hearing on the factual issues presented by the application of respondents' counsel for a "reasonable fee" and in its affirming of the district court's attorney's fee award?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

TOWN OF SMITHTOWN and JAMES DOWLING,

Petitioners,

-against-

ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The decision and order of the United States Court of Appeals for the Second Circuit here sought to be reviewed is reported at 46 F.3d 162. A copy of the printed slip opinion is reproduced in the appendix to this petition (A 1-17).[1] The

[1] "A" refers to the appendix to this petition; "JA" refers to the Joint Appendix in the court of appeals.

district court's order and memorandum explaining its reasons for reducing the hours for which the respondents' counsel should be compensated (A 48-53) is not officially reported. There were no other written opinions rendered in this action.

JURISDICTION

The decision and order sought to be reviewed was entered on January 24, 1995. By order entered March 24, 1995, the court of appeals denied petitioners' timely petition for rehearing (A54-55). This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> . . . nor shall private property be taken for public use, without just compensation.

United States Constitution,

Fourteenth Amendment:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C., Section 1983:

> Every person who, under color of [State law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law . . . for redress.

42 U.S.C., Section 1988(b) :

> In any action to enforce a provision of section [1983 of Title 42], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Section 245-15 of the Town Code of the Town of Smithtown, New York, provides, in relevant part, that

> [n]o person, firm or corporation [including the Suffolk County Water Authority] shall make any excavation in any town street . . . in the Town . . . without first obtaining a permit therefor from the [Town's] Superintendent of Highways . . . .

Section 245-16 of the Smithtown Town Code provides, in relevant part:

> A. Applications, in writing, shall be filed with the Superintendent of Highways upon application blanks which he shall provide or in such manner as he shall prescribe, which applications shall state the nature, location, extent and purpose of the proposed excavations.
>
> B. Applications by public service companies . . . must be accompanied by a general undertaking in such form as may be approved by the Town Board. Said general undertaking is tendered to assure that, after completing the excavation, said applicant leaves the street, highway or sidewalk, pavement, curb or gutter in the same condition it was prior to excavation.
>
> C. . . . The Superintendent of Highways may require such additional improvements as he deems necessary and appropriate for the health and safety of the public and to ensure proper construction procedures on the town roads and rights-of-way. . . . The Superintendent of Highways, at his discretion, may require a bond for one hundred percent (100%) of the estimated cost of the project. . . .
>
> D. Upon compliance with the foregoing requirements, a permit shall be issued in the name of the Superintendent of Highways of the Town of Smithtown.

STATEMENT OF THE CASE

This is an action brought pursuant to 42 U.S.C. Section 1983. In it the respondents, Robert and Lana Sue Walz and their son, Robert Walz, Jr., sue for and have been awarded damages against the respondents, the Town of Smithtown, New York, and the Town's Superintendent of Highways, James Dowling, based upon the theory that Dowling deprived the respondents, all of them, of a "property right" protected by the substantive due process component of the Due Process guarantee of the Fourteenth Amendment when he delayed the issuance of a street opening permit to the Suffolk County Water Authority, and then issued that permit subject to conditions, all allegedly toward the end of delaying the supplying of new public water service to the Walz home in order to coerce Mr. Walz into granting to the Town for no consideration,

for street widening purposes, the front fifteen feet of his property. The district court's jurisdiction was invoked pursuant to 28 U.S.C. Section 1343.

The district court held that the substantive due process protected "property right" of which the Walzes had been deprived was their claimed right to receive public water supply service. The court of appeals held that it need not decide whether the Walzes had such a right. Instead, it ruled, based on the purportedly binding effect of an earlier Second Circuit precedent, Brady v. Town of Colchester, 863 F2d. 205 (1988), that the Walzes had a substantive due process protected property right in the permit which had been sought by the Authority in order for the Authority to be allowed to open up the Town-owned street in front of the Walz home (A 10-14).

In its opinion the court of appeals

repeatedly referred to the respondents as if they were all "owners" of the property where they lived (e.g., A 3, 4, 14; but see A 8, describing Dowling's alleged motive as being to compel Mr. Walz to deed a portion of his property to the Town). It ignored for purposes of its due process "property" analysis that, as was admitted by the respondents in their complaint (JA 1563) and was made clear throughout these proceedings, the elder Mr. Walz was the sole owner of this property.

Since Mrs. Walz and Robert, Jr. had no ownership interest in this property, this case is in fact unlike Brady v. Town of Colchester, in that in Brady both plaintiffs were owners of the property affected by the denial of that permit. In addition, this case is also unlike Brady in that, while there the permit which had been denied to the Bradys, a zoning permit, directly affected what use could

be made of their property, here the permit in question did not limit what use could be made of this property. Rather, this permit pertained solely to the Authority's being authorized to excavate in the Town-owned street; it only indirectly affected what use could be made of Mr. Walz's property, which still could have been supplied with water by a well, as it had before. Also, the applicant for this permit was the Authority, not the Walzes; and it was the Authority, not the Walzes, which would be doing this work.

In the district court the respondents were explicit that they were not relying on any theory of a violation of Equal Protection. Nor did they claim a deprivation of any "liberty" interest or of procedural due process (see JA 831-32, 838-43). Indeed, as the court of appeals noted, the Walzes had availed themselves of the procedural relief afforded them by

New York law when they successfully brought a state-court proceeding which resulted in the state court ordering that the permit be issued to the Authority (A 13). In addition, the respondents were explicit that they were not complaining of a taking or attempted taking of Mr. Walz's land; rather, they were unequivocal that their complaint went to their having been deprived of water service to their home (JA 517: "We are not claiming that they took the property. We are claiming that they denied us water.").

We assume that the respondents did not attempt to ground their claim on the theory of a Fifth Amendment "taking" of land because, one, this case was brought and tried before Dolan v. City of Tigard, 114 S.Ct. 2309 (1994), had been decided, and, two, had that been their theory, that is, a Fifth Amendment "taking" violation, presumably only Mr. Walz, as the sole

owner of this property, would have had standing to complain of such violation.

Also, had respondents proceeded upon such a theory, they would have run the risk that this could be held to limit the damages to which they (or Mr. Walz) might be entitled, for example, based upon a temporary interference with the use of real property. In any event, though, no claim has been asserted in this action by respondents that any rights of their's under the Fifth Amendment were violated, compare, noting a similar claim limitation, Albright v. Oliver, 114 S.Ct. 807, 811-12 (1994), and, as we point out in more detail below, Dolan is plainly distinguishable from this case.

There was no claim here, nor any evidence, that Mr. Dowling had acted toward the respondents based on any sort of malevolence or personal animus toward them or for any purpose other than to

serve the public interest by acquiring a portion of Mr. Walz's land for road widening purposes at no cost.

Notwithstanding there was no proof that plaintiffs had ever suffered any physical injury or discomfort as a result of the lack of water supply to their home, and despite the fact that the only proof they submitted relating to "emotional distress" had to do with Mrs. Walz's testimony concerning her being "shocked" by what Dowling had allegedly told her in a January 17, 1992 conversation concerning their not getting public water unless Mr. Walz gave a part of his land to the Town and her husband's testimony about his shaking and being upset on that day following his having spoken to his wife (JA 79, 399), over the petitioners' objection (JA 920, 928-29, 968-75, 1124-25, 1133), the trial court instructed the jury that it could award the respondents

"compensatory damages" based on the "alleged suffering and emotional distress they claim to have sustained during the period from January 17, 1992 to April 28, 1992" (JA 1105-06). In fact, respondents' counsel expressly conceded that there was here no claim of "any kind" of "long-standing emotional distress" (JA 923), and there was neither proof nor claim that Robert, Jr. ever suffered any emotional distress.

Having thus been instructed, this jury made the following compensatory damages awards to the respondents for the periods from January 17 to March 6, March 6 to April 6, and April 6 to April 28, 1992 (JA 1164-67, 1557-60):

Period	Mr.Walz	Mrs.Walz	Robert,Jr.
1/17-3/6	$20,000	$20,000	$10,000
3/6-4/6	12,000	12,000	6,000
4/6-4/28	8,800	8,800	4,400
Total	$40,800	$40,800	$20,400

The total of these awards to the three respondents for all three periods was $102,000, or approximately $1,000 per day for the approximately 102-day period they were without water. There was no evidence in the record which supported the making of identical awards to Mr. and Mrs. Walz and the awarding to Robert, Jr. of precisely half what was awarded to each of his parents. The court of appeals rejected petitioners' argument that these awards were unauthorized and excessive (A 15-16).

In addition to these "compensatory" awards, the respondents were awarded as against Dowling $9,500 in punitive damages. They were also awarded, as against both petitioners, attorney's fees in the amount of $48,276.

The attorney's fee award was fixed by the district court based upon its determining that respondents' counsel

should be compensated at the rate of $200 per hour for virtually all of the hours which had been claimed by counsel, reduced only to account for time devoted to respondents' unsuccessful claim against the Water Authority (A 18-47, A 48-53). There was no evidentiary hearing held at which petitioners could cross-examine respondents' counsel concerning his claims with respect to hours devoted to this matter and what was a reasonable rate of compensation for counsel's services. Rather, this application was determined in open court on its return date (JA1262-79).

No contemporaneous time sheets or other similar documentation was submitted to support counsel's time claims. Nor was any documentation submitted in support of counsel's claims concerning what he contended was his usual billing rate and what he contended was a reasonable rate in the area where he practiced for this type

of legal work (see JA 1578-89). On appeal, the court of appeals rejected the petitioners' arguments that this attorney's fee award was excessive and that there should have been an evidentiary hearing on these issues (A 16-17). In this regard, the court stated (A 17):

> Appellants contend that the district court's failure to hold an evidentiary hearing before making a fee award of this magnitude violated their right to due process. However, awards of comparable size are routinely made without an evidentiary hearing, cf. Hensley [v. Eckerhart], 461 U.S. [424,] at 437 [1983] ("A request for attorney's fees should not result in a second major litigation."), and we are informed of nothing that would be developed in such a hearing that would alter the outcome.

In the affidavit of petitioners' counsel submitted in opposition to the application for attorney's fees (JA 1590-1598), petitioners' counsel had in fact urged, inter alia, that, given the overall insufficiency of opposing counsel's moving papers, it should not be the petitioners'

burden to challenge in detail all that had been claimed by respondents' attorney (JA 1591). Nonetheless, defense counsel did attack opposing counsel's time claims, as "either overstating the amount of time he spent on . . . matters, or, equally improper, . . . attempting to charge [the petitioners] with excessive time devoted to such matters" (JA 1592), and he followed up this general attack with specific challenges to a number of the discrete time claims made by respondents' counsel (JA 1592-94). Also, defense counsel raised a number of objections concerning the hourly rate being sought by counsel and counsel's claims as to the difficulty of this matter and why it required his special talents (JA 1594-98).

In the petitioners' answer in this action, qualified immunity was pleaded as an affirmative defense (JA 1572). In the district court it was held that this

defense was not available to Mr. Dowling because, according to the district court, the "preferred legal way" for Mr. Dowling to have acquired the portion of Mr. Walz's property which was desired for highway widening purposes would have been pursuant to eminent domain, not by Dowling's using his office to delay the delivery of water service as a means of compelling the property owner to give land to the Town for no consideration (JA 862-63).

In response to the argument by counsel for Dowling that the question of qualified immunity in this case turned on whether respondents had established that they had the precise substantive due process protected "property right" to obtain water which they claimed and their establishing that this was a constitutional right of which Mr. Dowling reasonably should have been aware, the district court stated, in relevant part:

> Not only did [Dowling] violate clearly established state law and code, and I am not sure you are right with respect to only constitutional violations.
>
> * * *
>
> I hold now as a matter of law that the proof in this case shows that he violated clearly established constitutional law, the most basic law, attempting to get property because of improper motivation.
>
> Now that doesn't mean as a matter of law he is liable. But giving the plaintiff every benefit at this point, I deny your application, your motion to dismiss for lack of any property interest. I deny your motion to dismiss because of no prima facie case of substantive due process property right violation. I deny your motion to dismiss on the basis of qualified immunity with respect to the defendant Dowling personally.

(JA 865-866).

As noted, in the court of appeals, that court held that the Walzes, all of the respondents, had a substantive due process protected "property right" in the street-opening permit sought by the Water Authority. In this regard, the court initially analyzed this question in terms

of whether the respondents had a "property interest" in this permit, without distinguishing between a property right protected as a matter of procedural due process, see, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972), and one protected as a matter of substantive due process, see, assuming for purposes of decision the existence of such a substantive due process protected property right, Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 222-223 (1985).

The court then proceeded to analyze this question based upon certain of the Second Circuit's own "due process property rights" precedents, wherein the question of whether a plaintiff had a property right in an "expectation interest" had been held to depend on whether the plaintiff had a "legitimate claim of entitlement," which, in turn, had been held to be dependent on "the amount of discretion

committed to the issuing authority" (A 9-11, quoting from RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 [2d Cir.], cert. denied, 493 U.S. 893 [1989], and Yale Auto Parts v. Johnson, 758 F.2d 54 [2d Cir. 1985]).

Following this, the court considered what discretion Dowling had with respect to the issuance of this street-opening permit, with the court ultimately holding that Dowling had no discretion with respect to this matter; his role was, the court held, merely ministerial (A 11-12). Notably, while in this part of its opinion the court quoted at length from Section 245-16 of the Town Code, it omitted to quote or discuss in any way subdivision "C" of that section, and, most critical, it ignored that under that subdivision there was an express delegation of discretion to the Superintendent.

Thereafter, the court went on to hold

that this "property interest" which the court was recognizing was protected as a matter of "substantive due process," with the court relying in this regard on its earlier decision in Brady v. Town of Colchester, 863 F.2d 205 (A 13).

In its discussion of this issue, the court of appeals noted that in Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, this Court had left open the question of "whether substantive due process protects state-created property rights" (A 13). Nonetheless, the court of appeals held, "the issue of whether substantive due process protects state-created property rights is resolved by precedents in this circuit that must be followed by a panel of this court," with the court then citing and discussing Brady as binding authority for the proposition that the respondents had a substantive due process protected property interest in this street-opening

permit (A 13). In addition, the court held,

> even if what is at stake is the Walzes' property interest in their land, that analysis would not . . . alter the outcome in the instant matter. As landowners, the Walzes surely had a right not to be compelled to convey some of their land in order to obtain utility service. See Dolan v. City of Tigard, 114 S.Ct. 2309, 2317 (1994) (absence of nexus between permit condition and legitimate state interest converts valid land regulation into an "out-and-out plan of extortion").

(A 13-14).

In so ruling, the court overlooked that there was no claim here by either Mrs. Walz or Robert, Jr. that they had any ownership interest in this property, which the respondents themselves had repeatedly and consistently indicated belonged solely to Mr. Walz. Likewise, the court ignored that the constitutional right held to have been violated in Dolan was the Fifth Amendment right to just compensation when property is taken for a public purpose, not the Fourteenth Amendment's guarantee

of "due process of law." Compare Albright v. Oliver, 114 S.Ct. 807 (suggesting, when Justice Souter's concurring opinion is read together with plurality opinion, that, at least ordinarily, the Due Process Clause should not be construed to find a substantive due process protected interest where a specific enumerated Bill of Rights protection is itself applicable).

In addition, this part of the court below's decision is also notable for its avoidance of any mention of this Court's more recent decisions dealing with the question of substantive due process. See, e.g., Albright v. Oliver, 114 S.Ct. 807; Collins v. City of Harker Heights, Texas, 112 S.Ct. 1061 (1992) (reviewing substantive due process principles and precedents); Reno v. Flores, 113 S.Ct. 1439, 1447 (1993) (citing and quoting from Collins for proposition that doctrine of judicial self-restraint requires that the

Court exercise utmost care when asked to break new ground in this field; notes that substantive due process analysis must begin with a careful description of the asserted right; indicates that "mere novelty" of asserted right argues against proposition that it is "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992) (indicating this Court's apparent theoretical difficulty with holding that there is a substantive due process protected liberty interest with respect to a woman's claimed "right" to an abortion); id., at 2804-2808 (Joint Opinion of Justices O'Connor, Kennedy and Souter) (indicating that substantive due process protection, as distinct from rights secured by enumerated Bill of Rights protections, should be reserved for

"basic" or "fundamental" interests or rights); Siegert v. Gilley, 500 U.S. 226 (1991) (holding that plaintiff had no substantive due process protected liberty interest in government employment); Graham v. Connor, 490 U.S. 386, 395 (1989) (substantive due process claim not available where Fourth Amendment applicable); Whitley v. Albers, 475 U.S. 312, 327 (1986) (substantive due process claim unavailable in face of applicability of Eighth Amendment); see also Regents of the University of Michigan v. Ewing, 474 U.S., at 228-230 (Powell,J., concurring) (explaining why, even assuming that plaintiff might have had a procedural due process protected state-law created property right in continued participation in program, he did not have such right as a matter of substantive due process).

With respect to the issue of Mr. Dowling's claimed defense of qualified

immunity, again, the court of appeals' decision appears critically to have turned on the court's misreading of Section 245-16 of the Smithtown Town Code, with the court having omitted to quote or consider the language of subdivision "C" of that section, which, in relevant part, specifically provides that "[t]he Superintendent of Highways may require [of an applicant for a highway excavation permit] such additional improvements as he deems necessary and appropriate for the health and safety of the public" and that "at his discretion [the Superintendent] may require a bond for one hundred percent (100%) of the estimated cost of the project."

This language in paragraph "C" is, we believe, squarely inconsistent with the court below's holding that Mr. Dowling had no discretion to exercise with respect to the issuance and/or conditioning of

this permit. Just the opposite, this language clearly vests in the Town's Superintendent of Highways both a critically important responsibility and broad discretion to determine what, if any, conditions should be imposed with respect to allowing a street opening. It requires him to examine any such application in order to determine what are its implications for the "health and safety of the public" and whether there are any "additional improvements" which he should require of the applicant as "necessary and appropriate for the health and safety of the public." It expressly authorizes the Superintendent to impose such conditions, and, as a corollary to such authority, it must be read as authorizing him to delay (or revoke) the issuance of a permit while these determinations are made. Compare Davis v. Scherer, 468 U.S. 183, 196n. 14 (1984)

("In any event, the rules that purportedly established appellants' 'ministerial duties' in the present case left to appellants a substantial measure of discretion. . . . Appellants were to determine, for example, what constituted a 'complete investigation' and a 'thorough study of all information' sufficient to justify a decision to terminate appellee's employment.").

REASONS FOR GRANTING THE WRIT

1. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE SO IMPORTANT QUESTION PRESENTED BY THIS CASE OF WHETHER THERE IS IN FACT ANY SUCH THING AS A SUBSTANTIVE DUE PROCESS PROTECTED "PROPERTY RIGHT" AND, IN ANY EVENT, TO MAKE IT CLEAR TO THE LOWER COURTS THAT THERE CAN BE NO SUBSTANTIVE DUE PROCESS PROTECTED PROPERTY INTEREST IN A PERMIT OR OTHER EXPECTATION INTERST SUCH AS THOSE INVOLVED IN THIS CASE.

In Newman v. Burgin, 930 F.2d 955 (1st Cir. 1991), then Chief Judge Breyer noted, citing Regents of Univ. of Michigan v. Ewing, 474 U.S., at 223, and Board of Curators v. Horowitz, 435 U.S. 78, 91-92

(1978), that twice this Court has said that it would "assume that an individual, in respect to 'property,' has a Constitutional ('due process') right to be 'free from arbitrary state action.'" 930 F.2d, at 962. But, as then Chief Judge Breyer there noted, this Court "has not explicitly held that such a right exists, nor has it described its contours." Id.

That was in 1991, at a time when there was, undoubtedly, more confusion than there is now as to the direction this Court's substantive due process jurisprudence would be taking. Since that time, however, there have been a number of decisions of this Court attempting to come to grips with the question of what is the proper meaning and reach of the concept of "substantive due process." And, despite at least one commentator's view that this area of constitutional law is still hopelessly confused, see R. H. Fallon,

Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 Col. L. Rev. 309 (1993) ("Due process doctrine subsists in confusion. . . . The concept of substantive due process introduces further tensions, ambiguities, and ambivalences."), there does appear to have been a definite breakthrough achieved in terms of doctrinal order and consistency by reason of this Court's most recent decisions in this area. See, e.g., Albright, Reno and Collins.

Moreover, in at least some of the circuits the courts of appeals have not shied away from attempting to analyze the problems here posed based upon very careful consideration of this Court's recent precedents. See, e.g., McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (in banc reconsideration and overruling of Eleventh Circuit's prior holdings to the

effect that public employees had a substantive due process protected property right against pretextual termination; analysis attempts to take into account recent substantive due process decisions of this Court as well as implications for claims of violations of substantive due process protected interests of decisions in Zinermon v. Burch, 494 U.S. 113 [1990], and Parratt v. Taylor, 451 U.S. 517 [1984]); Mansfield Apartment Owners Association v. City of Mansfield, 988 F.2d 1469, 1473-1474 and 1476-1478 (6th Cir. 1993) (distinguishing between procedural and substantive due process protected interests and rejecting plaintiffs' claim that they were deprived of substantive due process by reason of municipal utility's termination of water service); Ransom v. Marrazzo, 848 F.2d 398, 411-412 (3rd Cir. 1988) (same); Nestor Colon Medina & Sucesores, Inc. v.

Custodio, 964 F.2d 32, 45-47 (1st Cir. 1992) (indicating substantive due process claim unavailable where other, specific Bill of Rights protection available or potentially applicable); Miller v. Campbell County, 945 F.2d 348, 352-54 (10th Cir. 1991) (relief based on substantive due process unavailable where relief under Fifth Amendment's Taking Clause could arguably be available); cf. Mertik v. Blalock, 993 F.2d 1353, 1367-68 (6th Cir. 1993) (distinguishing between two types of substantive due process claims, those based on "denial of a right, privilege or immunity secured by the Constitution or by federal statute other than procedural claims under 'the Fourteenth Amendment simpliciter,'" and those based on conduct which "shocks the conscience of the court"); Reich v. Beharry, 883 F.2d 239, 243-245 (3rd Cir. 1989) (reaffirming Third Circuit's

adherence to distinction between procedural and substantive due process protected property rights and citing other circuit decisions to similar effect).

As we read this Court's most recent decisions involving substantive due process, at least the following principles now seem fairly settled:

First, at least in general, that is, absent some sort of assault on a "basic" or "fundamental" human right, the substantive component of the Due Process Clause of the Fourteenth Amendment may not be construed as extending substantive due process protection beyond what is provided under the specific enumerated protections contained in the Bill Of Rights. This is the apparent teaching of Albright v. Oliver, 114 S.Ct. 807, when Justice Souter's concurring opinion is read together with the plurality opinion in that case.

Second, the "mere novelty" of a party's substantive due process claim furnishes strong reason to doubt that substantive due process can alone sustain it. Reno v. Flores, 113 S.Ct., at 1447. In order for there to be such a protected right, it should appear that this claimed right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. Compare Regents of Univ. of Michigan v. Ewing, 474 U.S., at 229 (Powell, J., concurring) ("substantive due process rights are created only by the Constitution").

Third, the doctrine of judicial self-restraint requires that even this Court exercise the utmost care when asked to break new ground in this field. Reno v. Flores, 113 U.S., at 1447, citing and quoting from Collins v. City of Harker Heights, 112 S.Ct. 1061.

In addition to these principles, all

of which in fact have strong antecedents in this Court's earlier due process jurisprudence, see, e.g., Rochin v. California, 342 U.S. 165, 172 (1952); Palko v. Connecticut, 302 U.S. 319, 325 (1937), it would also appear required, by implication, as the Eleventh Circuit has recently suggested in its in banc decision in McKinney v. Pate, 20 F.3d 1550, that substantive due process protection should not be so enlarged as to undermine and, in effect, render meaningless what this Court has attempted to do through Parratt v. Taylor, 451 U.S. 517, and Parratt's progeny with respect to placing limits on damages claims under Section 1983 for alleged procedural due process violations. See 20 F.2d, at 1559-60 and 1562-63. See also Kauth v. Hartford Ins. Co, of Illinois, 852 F.2d 951, 957 (7th Cir. 1988); Schaper v. City of Huntsville, 813 F.2d 709, 717-18 (5th Cir. 1987).

Also, now that this Court has indicated, in Dolan v. City of Tigard, 114 S.Ct. 2309, how the Fifth Amendment's Taking Clause may be applied in cases where there is an improper or unreasonable limitation or condition imposed on a property owner's ability to utilize his land, it seems clear that at least the vast bulk of the lower-court decisional law analyzing restrictions on land use in terms of "substantive due process," rather than based on a "taking" analysis, see, e.g., Brady v. Town of Colchester, 863 F.2d 205; see also Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1379 (11th Cir. 1994); Gardner v. Baltimore Mayor and City Council, 969 F.2d 63, 68-69 (4th Cir. 1992), has been critically undermined. In addition to that sort of substantive due process approach to the rights of landowners being linguistically awkward and inconsistent with the notion that

substantive due process protections should be reserved for "fundamental" or "basic" interests, that approach should in most instances no longer be necessary. The Fifth Amendment's protections should ordinarily suffice. Moreover, in light of the at least arguable applicability of the Fifth Amendment's Taking Clause to such cases, it would seem that substantive due process may not properly be relied upon as a ground for relief. See Albright v. Oliver, 114 S.Ct. 807. Compare Miller v. Campbell County, 945 F.2d, at 352-54.

Nonetheless, notwithstanding all of these considerations, and these recent decisions of this Court, here we have the Court of Appeals for the Second Circuit ignoring all of these so important developments in this Court's due process jurisprudence, and, instead, woodenly, and most awkwardly, attempting to fit this case within the compass of an already

dated Second Circuit precedent, Brady, which, one, is in fact, not at all well thought-out and, two, is itself suspect even in the Second Circuit (see A 13, citing RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d, at 917).

In addition, here we have the court below holding that the issue of whether the respondents had a substantive due process protected property interest in the Authority's expectation of receiving this permit, should be determined based solely on a Roth-type "entitlement" analysis, without any consideration at all as to whether what is involved here is any sort of "basic" or "fundamental" right or "property interest" belonging to anybody.

Moreover, here we have it being held that these respondents, all of them, were each deprived of a substantive due process protected property right where it is not even clear that this type of contingent

expectation would, under the Second Circuit's own precedents, constitute a "property interest" which is protected as a matter of procedural due process. Compare Sudarsky v. City of New York, 779 F. Supp. 287, 294-297 (S.D.N.Y. 1991), aff'd without op., 969 F.2d 1041 (2d Cir. 1992), cert. denied, 122 L.Ed.2d 365 (1993) (district court had to struggle in attempting to reconcile Second Circuit's seemingly irreconcilable and, at the least, confusing "property interest" precedents); RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (comprehensive review of Second Circuit's "property interest" precedents; inconsistency and confusion virtually admitted). Compare also Board of Regents v. Roth, 408 U.S., at 572 (noting requirement that there must be "boundaries" for the meanings of the terms "liberty" and "property" as found in the

Due Process Clause).

Also, here we have the Second Circuit violating what we believe is the so clear teaching of Albright v. Oliver that substantive due process should not be relied upon where there is a specific enumerated Bill of Rights guarantee which is even arguably applicable to the case before the court, which in this case would be the Fifth Amendment's Taking Clause. And, even worse, here we have an instance where substantive due process is being relied upon to grant rights to Mrs. Walz and Robert, Jr., who are not claimed to have any ownership interest in Mr. Walz's property, which, plainly, even the Fifth Amendment's Taking Clause does not grant to these respondents.

Moreover, the court of appeals overlooked that this case is unlike Dolan, as well as Brady, in that what those cases involved were permits directly affecting

the landowner's right to use his land, while in this case the permit had to do with what could be done on the Town-owned street (by a third-party, no less). To this extent, this case is analogous to the situation where one property owner exacts a concession from another in exchange for the grant of an easement benefitting the other property owner, not to a "taking."

Finally, it is notable here that, had the court below not misread Section 245-16 and mistakenly concluded that Mr. Dowling had no discretion to exercise with respect to the issuance of this permit, it would have followed that, even under a Roth-type analysis, it would have had to have been held that respondents did not have any property interest in this permit. See A 9-12. Compare RRI Realty v. Incorporated Village of Southampton, 870 F.2d 911; Gardner v. Baltimore Mayor & City Council, 969 F.2d, at 68-69.

In short, in this case this Court is presented with a court of appeals decision which in any number of critical respects is directly contrary to this Court's clear teachings and, in any event, is critically flawed. In addition, here we have a holding which stands in stark contrast with what other circuits are increasingly coming to see as the necessary limits on the concept of substantive due process.

This is, obviously, a most important court of appeals decision, with the clear potential for far-reaching, and we believe most unfortunate, consequences should it be followed by other courts. It plainly warrants review by this Court, so that there can be an end to this sort of confusion and conflict between the circuits and between this Court's teachings and what certain lower courts apparently still believe they are at liberty to do. And, for these reasons, it

is submitted, it is here especially important that this Court should grant review and address these issues.

* * *

As to the district's court's holding in this case that the respondents had a substantive due process protected property right with respect to their expectation of receiving new public water supply service, we would note that this holding is, as the court of appeals noted, "novel" (A9). It is also directly contrary to what two circuits have already held with respect to there being no substantive due process protected property right to continued public water supply service. See Mansfield Apartment Owners Association v. City of Mansfield, 988 F.2d 1469; Ransom v. Marrazzo, 848 F.2d 398. Furthermore, we submit, this holding cannot be squared with this Court's recent substantive due process holdings to the effect that

substantive due process protects "basic" or "fundamental" interests. What this case involved was inconvenience to the Walzes and/or an interference with the enjoyment of Mr. Walz's real property, not any deprivation of substantive due process.

2. THIS COURT SHOULD ALSO GRANT REVIEW IN ORDER TO ADDRESS WHETHER PETITIONER DOWLING'S ALLEGED MOTIVE WAS SUFFICIENT TO SUPPORT A FINDING OF A VIOLATION OF SUBSTANTIVE DUE PROCESS.

Even assuming that respondents had a substantive due process protected property right of which it could here be said they were "deprived," it cannot, we submit, be held on this record that Mr. Dowling's action was "arbitrary" in the sense which is required under Ewing and Collins in order to constitute a violation of substantive due process, in that it is undisputed that Dowling did not act for a selfish or venal motive, but rather only to serve the interests of the public and

the Town. Compare Ewing, 474 U.S., at 224-228; Collins, 112 S.Ct., at 1070-1071.

There are, of course, different mental states required to commit different constitutional torts. For example, a governmental taking of property in violation of the Fifth Amendment is probably complete without regard to the state actor's mental state. Similarly, it has been held that it is sufficient to constitute a seizure in violation of the Fourth Amendment that there was a termination of freedom of movement through means intentionally applied. Brower v. Inyo County, 489 U.S. 593 (1989). On the other hand, this Court has held that in order to make out a cause of action based on a pure and simple violation of "substantive due process," not based on the incorporation of some other right secured by the Bill of Rights, which is the nature of respondents' claim in this

case, the plaintiff must be able to show that the defendant acted for an improper motive, failing which his or her evidence must be held insufficient as a matter of law. See Collins, 112 S.Ct. at 1071; Ewing, 474 U.S. at 224-228.

To be sure, these decisions have not focused sharply on precisely what mental state must be shown in order to make out such a substantive due process claim, but Ewing indicates that action is not "arbitrary" if it is based on a reasoned determination, and Collins suggests that action is not "arbitrary in the constitutional sense" if it is reasonably related to a legitimate governmental purpose.

In this regard, we would suggest, if there is to be recognized a "substantive due process" protected "property right" of the sort respondents here urge, then, in order to keep that right (and its remedies) within manageable bounds, there

must be a mental state element required to find a violation of such right which does not allow for the imposition of liability except in instances of clear bad faith or venality or wantonness. Such a cause of action ought not to be allowed where, as here, the defendant's action was taken for a legitimate governmental motive. Cf. Pearson v. City of Grand Blanc, 961 F.2d 1211, 1220-1223 (6th Cir. 1992); Newman v. Burgin, 930 F.2d, 961-963 (indicates both questionable status of concept of substantive due process protected "property right" in expectation interest and necessary narrowness in this context of concept of "arbitrariness" in violation of substantive due process). See also San Filippo v. Bongiovani, 961 F.2d 1125 (3rd Cir. 1992).

Of course, we do not purport to know how, ultimately, this Court will resolve the question here presented of what is the

intent element of a substantive due process violation such as respondents urge petitioner Dowling committed. But, we submit, the intent shown here, that is, to serve the public interest by attempting to secure a concession from a property owner in exchange for the Town's allowing a use to be made of its street which specially benefits that landowner, ought not to be held "arbitrary in the constitutional sense."

This is, plainly, a question which this Court will at one point have to address in more detail than it has previously. And, if there can in fact be the "property right" which respondents urge, and the court of appeals has here found, in this sort of permit, then, we submit, this is an appropriate case in which this Court should address this so important question of intent.

3. REVIEW SHOULD BE GRANTED TO INSURE THAT THIS COURT'S HOLDINGS WITH RESPECT TO THE DEFENSE OF QUALIFIED IMMUNITY ARE FOLLOWED BY THE LOWER COURTS.

In the courts below, the respondents had no answer to our argument that they had no clearly established substantive due process protected property right to either the new water service they sought or the permit sought by the Water Authority, and, plainly, there could be no argument made that Mr. Dowling should reasonably have realized that what he is here alleged to have done was violative of any such "clearly established" substantive due process protected property right of any of the respondents. See generally Elder v. Holloway, 114 S.Ct. 1023 (1994); Siegert v. Gilley, 500 U.S. 226; Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Neither did the court of appeals have any answer to this argument. Instead, what the court below did here was, either deliberately or inadvertently, to ignore

critical facts of this case, more particularly, the language of Town Code Section 245-16, by not merely omitting to quote, but also altogether ignoring subdivision "C" of that section.

In this regard, we would note, the court below's reading of Section 245-16 as making Dowling's role with respect to the issuance of excavation permits merely "ministerial" (A 12 and 14-15) was plainly inconsistent both with what subdivision "C" of this local law states and with the actual reality of his responsibilities.

Also, the court below's attempted reliance here, in the face of the actual facts of this case and the full language of Section 245-16, upon what this Court said in Davis v. Scherer, 468 U.S. 183, and Harlow v. Fitzgerald, 457 U.S. 800 (1982), with respect to persons performing merely ministerial tasks not being protected by qualified immunity simply

cannot be reconciled with any fair, common sense reading of this local law or with this Court's decisions in Davis and Harlow. Compare Davis v. Scherer, 468 U.S., at 196 n. 14 ("In any event, the rules that purportedly established appellants' 'ministerial duties' in the present case left to appellants a substantial measure of discretion. . . . Appellants were to determine, for example, what constituted a 'complete investigation' and a 'thorough study of all information' sufficient to justify a decision to terminate appellee's employment."). Nor can this holding be reconciled with what this Court has said by way of justification for its recognition of the defense of qualified immunity. See, e.g., Harlow, 457 U.S., 817-19; Davis, 468 U.S., 194-96.

With all respect, this Court should not tolerate what has occurred in this

case with respect to this issue. If for no other reason, review should be granted here in order to vindicate this Court's role as the supreme arbiter of what is the law under our system of government.

4. REVIEW SHOULD BE GRANTED IN ORDER THAT THIS COURT MAY ADDRESS THE SO IMPORTANT AND LIKELY TO RECUR ISSUES PRESENTED BY THIS CASE CONCERNING WHAT IS THE PROPER MEASURE OF DAMAGES AND WHAT PROOF IS REQUIRED TO SUPPORT AN AWARD OF DAMAGES IN A CASE SUCH AS THIS.

As we have noted, respondents put in no evidence that they ever suffered any emotional distress as a result of their being without water at their home. They did attempt to claim emotional distress with respect to Mrs. Walz's claim of "shock" on January 17 as a result of her conversation with Dowling and with respect to Mr. Walz's claim that later that day he was shaking and upset as a result of the phone call from his wife, but that claimed emotional distress had to do with their

reactions to words which had been spoken to them, not with their being without water. Moreover, respondents put in no proof that they experienced any physical injury or suffering as a result of the lack of water during the period between January 17 and April 28, 1992. What they proved, and all that they proved, was inconvenience, perhaps very substantial inconvenience, but nothing more.

Nonetheless, this jury determined to award the respondents, collectively, a total of $102,000, or $1,000 per day, as supposedly "compensation" for this inconvenience which the respondents suffered. And, further demonstrating the irrationality of these awards, this jury determined that Mr. and Mrs. Walz should each be awarded the identical amount, which plainly does not evidence any sort of individualized attempt at compensating these plaintiffs. And, consistent with

that irrationality, the jury determined to award Robert, Jr. precisely half of what it awarded each of his parents.

Put most simply, these awards cannot be reconciled with this Court's so clear teachings, only recently reaffirmed in Farrar v. Hobby, 113 S.Ct. 566 (1992), that the "basic purpose" of a Section 1983 damage award is to compensate for injury caused by the deprivation of a constitutional right and that no compensatory damages may be awarded "absent proof of actual injury." Id., at 573, citing Carey v. Piphus, 435 U.S. 247, 254 (1978), and Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986). Accordingly, for this reason as well review should here be granted.

5. REVIEW SHOULD BE GRANTED TO CORRECT THE COURT BELOW'S MISREADING OF HENSLEY v. ECKERHART AS NOT REQUIRING THAT A PARTY OPPOSING A SECTION 1988 FEE APPLICATION BE ACCORDED A FAIR OPPORTUNITY TO CONTEST THE CLAIMANT'S FACTUAL CONTENTIONS, INCLUDING, WHERE APPROPRIATE, SOME SORT OF EVIDENTIARY HEARING, AND TO REAFFIRM THAT, IN ANY EVENT, SUCH AN AWARD MUST BE BASED ON PROOF AND, ULTIMATELY, IT MUST BE REASONABLE.

Should this Court agree with us that respondents' Section 1983 claims must be in all respects dismissed, it would follow that their claims under Section 1988 for attorneys' fees would likewise have to be denied. They would not be "prevailing parties." Similarly, should it be held that certain, but not all, such claims must be dismissed, leaving Mr.Dowling and/or the Town still liable to one or more respondents, or that these damages awards were excessive, it would follow that there would have to be a remand for reconsideration of this fee award. Compare Farrar v. Hobby, 113 S.Ct., at 574-575, and authorities there cited.

However, our disagreement with this attorney fee award goes far beyond those possibilities. Rather, it is, most fundamentally, based on our submission that so excessive and inadequately supported was this fee application that, if any award was here to be allowed, as a matter of due process, the district court should have held a proper evidentiary hearing before making an allowance of this magnitude. It should have required respondents' counsel to testify under oath as to his so extravagant claims as to his customary billing rate and the time he says he devoted to this matter. It should have afforded the Town and Dowling the opportunity to cross-examine him on these claims.

What has occurred here with respect to this fee award and the process by which this application was determined makes a mockery of all that this Court has said

about the importance, indeed, the critical role, of adequate time records on an application such as this, see, e.g., Hensley v. Eckerhart, 461 U.S., at 437; see also Webb v. Board of Education, 471 U.S. 234, 242 (1985), and what this Court said in Farrar v. Hobby, 113 S.Ct. 566, about the purpose of allowing an award of attorney fees in cases such as this and what the term "reasonable" means in Section 1988.

Further, we would urge, whatever may be the state of the law with respect to the issue of "proportionality," see, e.g., Grant v. Martinez, 973 F.2d 96, 99 and 101-102 (2d Cir. 1992), cert. denied sub nom. Bethlehem Steel Corp. v. Grant, 113 S.Ct. 978 (1993), it cannot be held, at least not consistent with what this Court indicated in Farrar v. Hobby, that this award of nearly $50,000 in this case is "reasonable." See 113 S.Ct., at 574-575,

citing and quoting from Blanchard v. Bergeron, 489 U.S. 87, at 96 (1989), and Justice Powell's concurrence in Riverside v. Rivera, 477 U.S. 561, at 585 (1986), as support for the proposition that the amount of damages awarded in an action seeking solely damages is a central factor to be considered in determining the amount of any attorney's fee to be awarded.

On this issue, we believe, especially since here there was no evidentiary hearing at which counsel's credibility could be tested and determined by the trial court, this Court has plenary power to determine de novo the amount which ought to be awarded pursuant to Section 1988 as a "reasonable" attorney's fee. Cf. Farrar v. Hobby. At the least, this award can be reviewed for error of law or abuse of discretion, on both of which grounds, it is submitted, this award is required to be vacated.

This case took but six days to try. In fact, while the law on which this claim is based is in many respects difficult and confusing, in terms of the respondents' theory of their case and their proof, this was a simple, straight-forward case. It was no particular challenge to try. It did not require any sort of extraordinary pretrial efforts. Nor is there any evidence in this record that respondents' counsel ever exerted any extraordinary efforts on this matter.

Plainly, this was not either an effort on counsel's part or a result which could ever justify the fee of in excess of $60,000 which counsel had requested (JA 1576-89), and this Court should not countenance this sort of overreaching and imposition on the part of counsel in making a Section 1988 fee application.

This sort of conduct on the part of counsel is, at the least, unethical. It

constitutes not merely an imposition on the courts, but also an attempt by counsel to secure from the defendants money to which counsel is simply not entitled. Accordingly, this should not be tolerated. Just the opposite, it is submitted, in the face of this type of overreaching, this Court should hold that counsel who engages in such conduct forfeits any claim to a fee award. Compare Fair Housing of Greater Washington v. Landow, 999 F.2d 92, 96-98 (4th Cir. 1993); Lewis v. Kendrick, 944 F.2d 949, 956-958 (1st Cir. 1991); Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980); cf. Lewis v. Coughlin, 801 F.2d 570, 577 (2d Cir. 1986); New York Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983); Pontarelli v. Stone, 781 F.Supp. 114, 120-124 (D.R.I. 1992).

If, nonetheless, there is to be an attorney fee award in this case, we submit

that the fee to be awarded here should be far, far less than the award made by the trial court. For example, we would suggest, as we did below (see JA 1598 and 1604 [suggesting an award of $13,800 based on a 50% reduction of claimed hours and a rate of $100 per hour]), that this attorney's fee award should not exceed somewhere in the range of $10,000 to $15,000, subject, of course, to further reduction depending upon which of the petitioners may ultimately be held liable to which of the respondents and how much is ultimately awarded to respondents following this Court's review of the judgment appealed from. See Farrar v. Hobby, 113 S.Ct., at 574-575; Hensley v. Eckerhart, 461 U.S., at 434-37.

CONCLUSION

This Court should grant the writ of certiorari to review the questions which are here presented.

Dated: April 17, 1995

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1996—August Term, 1993

(Argued: August 8, 1994 Decided: January 24, 1995)

Docket No. 94-7268

ROBERT WALZ, LANA SUE WALZ, and
ROBERT WALZ, JR.,

Plaintiffs-Appellees,

—v.—

TOWN OF SMITHTOWN and JAMES DOWLING, personally and as Superintendent of Highways of the Town of Smithtown,

Defendants-Appellants,

SUFFOLK COUNTY WATER AUTHORITY,

Defendant.

Before:

WINTER and LEVAL, *Circuit Judges*,
and SKRETNY,* *District Judge*.

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* The Honorable William M. Skretny, United States District Court for the Western District of New York, sitting by designation.

Appeal from an award of damages after a jury trial in the United States District Court for the Eastern District of New York (Arthur D. Spatt, *Judge*) to a homeowner deprived of water supply service by the refusal of a town official to issue an excavation permit for a public street. We conclude that the homeowner possessed an entitlement to an excavation permit that constitutes a property right. We affirm the jury verdict. We reject the official's claim of qualified immunity and affirm the award of attorney's fees.

L. KEVIN SHERIDAN, Smithtown, New York (Thomas J. Spellman, Jr., Devitt & Spellman, Smithtown, New York, of counsel), *for Defendants-Appellants*.

WILLIAM D. WEXLER, North Babylon, New York (Kevin Snover, of counsel), *for Plaintiffs-Appellees*.

WINTER, *Circuit Judge*:

The Town of Smithtown ("Smithtown") and James Dowling, the town's Superintendent of Highways, appeal from an adverse jury verdict awarding damages for violating the substantive due process rights of Robert Walz, Lana Sue Walz, and Robert Walz, Jr. (the "Walzes"). The Walzes were denied access to public water supply when Dowling refused to issue a permit allowing the county water authority to excavate a public street in order to

connect the Walzes' home to the public water system. Dowling's refusal was intended to coerce the Walzes to convey some of their land to Smithtown. We affirm.

BACKGROUND

The Walzes own a home on a parcel of land on Ketcham Avenue in Smithtown, New York. For approximately twenty-six years, water was supplied by a well on the property. In late December 1991, the Walzes experienced problems with the well, which was shut down on New Year's Day, 1992.

On January 9, 1992, the Walzes applied to the Suffolk County Water Authority for public water service. As instructed by the Authority, they dug a trench on their property for the water line, which was approved by the Water Authority on January 16. That day, the Walzes paid the Water Authority the $1,100 required fee. However, an excavation permit from Smithtown was required in order to excavate Ketcham Avenue, which was a public street.

When processing emergency applications for water service, the Water Authority typically obtains an excavation permit on behalf of the applicant by telephoning for verbal authorization. On January 16, a person in the Water Authority made such a call to the Highway Department to obtain a permit. A clerk at the Highway Department gave verbal authorization. She then typed a permit that stated: "EMERGENCY Water Service—verbal approval 1/16/92." On the morning of January 17, Dowling signed the permit. Later that morning, Dowling instructed the clerk to void the permit. After doing so, the clerk informed the Water Authority that the permit

was now void. The person with whom the clerk spoke at the Water Authority asked whether Dowling was aware that the Walzes had been "without water and heat since before the holidays." The clerk stated that Dowling was aware of this fact. Dowling also telephoned a District Manager for the Water Authority to inform him that the permit had been cancelled.

Dowling then telephoned Mrs. Walz and asked her whether the Walzes would deed the front fifteen feet of their property to Smithtown for road widening purposes. During the conversation, Dowling told her that the Walzes would not receive water supply service until the fifteen foot wide strip of land was conveyed to Smithtown. Mr. Walz went to the Water Authority, but it was unable to provide any help.

Shortly after Mr. Walz returned home from the Water Authority, a Highway Department employee arrived at the Walzes' home with a draft deed by which the Walzes would convey the front fifteen feet of their property to Smithtown. The Walzes confronted Dowling at the offices of the Highway Department and told him that they would not give up their land to obtain water supply service.

The next day, January 18, Dowling left for a four-week vacation, during which he made no inquiry regarding the status of the Walzes' permit application. Upon returning from vacation, Dowling contacted the Smithtown Town Attorney for help in obtaining the strip of property from the Walzes. In a letter to the Town Attorney, Dowling wrote that he wanted to improve Ketcham Avenue—which in front of the Walz property was unpaved, and too narrow—but that the residents of Ketcham Avenue were uncooperative.

On March 3, the Walzes commenced an Article 78 proceeding in the New York Supreme Court seeking an order compelling Dowling to issue a permit to the Water Authority and compelling the Water Authority to connect the Walzes' home to the public water supply. The defendants argued that the proceeding was moot in light of an excavation permit issued on March 6. However, this excavation permit included special requirements that a concrete curb be installed along the edge of the roadway, that a jacking fee of $900 be paid to dig beneath the road, and that a fee of $1,100 be paid for patching the road. The permit also required the posting of a $3,678 cash bond. The typical excavation permit contains no such conditions.

On March 27, Justice William L. Underwood ruled that the curbing requirement was unreasonable and ordered Dowling to issue a permit consistent with his opinion. On April 6, a new permit was issued which was identical to the March 6 permit but for the omission of the curbing requirement and a corresponding reduction in the cash bond requirement. The Walzes, believing that the April 6 permit was inconsistent with Justice Underwood's order, filed a motion to hold Dowling in contempt. The motion was returnable on April 27, but on April 24, Dowling issued a permit at the standard fee of $35 and the Walzes' were connected to the public water supply on April 28.

The Walzes subsequently brought the present Section 1983 action for damages on the ground that Dowling's conduct violated the substantive component of the Due Process Clause of the Fourteenth Amendment. In answer to a series of special interrogatories, set out in pertinent

part in the margin,[1] the jury found that Dowling was aware on January 17, 1992, that the Walzes were without

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[1] The interrogatories relating to the Town and Dowling, and the answers given by the jury, were:

January 17, 1992 Permit

1. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling knew on January 17, 1992 that the plaintiffs did not have their own water supply?

YES __X__ NO _____

If your answer to question 1 is "NO," please answer question 4.
If your answer to question 1 is "YES," please answer question 2.

2. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling voided the January 17, 1992 permit, that would have allowed the Suffolk County Water Authority to open Ketcham Avenue for the purpose of connecting the Walz property to the water main, to intentionally deprive the plaintiffs of a water supply on their property?

YES __X__ NO _____

If your answer to question 2 is "NO," please answer question 4.
If your answer to question 2 is "YES," please answer question 3.

3. Did the plaintiffs prove, by a preponderance of the evidence that the defendant James Dowling voided the January 17, 1992 permit because of an improper motive, namely to compel the plaintiff Robert Walz to deed a portion of his property to the Town of Smithtown?

YES __X__ NO _____

If your answer to question 3 is "NO," you have found a verdict in favor of the defendants James Dowling and the Town of Smithtown for the period from January 17, 1992 to March 6, 1992.

If your answer to question 3 is "YES," you have found a verdict in favor of the plaintiffs and against the defendants James Dowling and the Town of Smithtown for the time period from January 17, 1992 to March 6, 1992.

In either case, please answer question 4.

March 6, 1992 Permit

4. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling knew on March 6, 1992 that the plaintiffs did not have their own water supply?

YES __X__ NO _____

(*footnote continued*)

water and that Dowling's reason for voiding the excavation permit was to deprive the plaintiffs of water. The

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If your answer to question 4 is "NO," please answer question 8.
If your answer to question 4 is "YES," please answer question 5.

5. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling knew that the conditions placed on the March 6, 1992 permit were improper and unreasonable?

YES __X__ NO _____

If your answer to question 5 is "NO," please answer question 8.
If your answer to question 5 is "YES," please answer question 6.

6. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling placed the conditions on the March 6, 1992 permit to intentionally prevent the Suffolk County Water Authority from connecting the Walz property to the water main?

YES __X__ NO _____

If your answer to question 6 is "NO," please answer question 8.
If your answer to question 6 is "YES," please answer question 7.

7. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling placed the conditions on the March 6, 1992 permit because of an improper motive, namely, to compel the plaintiff Robert Walz to deed a portion of his property to the Town of Smithtown?

YES __X__ NO _____

If your answer to question 7 is "NO," you have found a verdict in favor of the defendants James Dowling and the Town of Smithtown for the time period from March 6, 1992 to April 6, 1992.

If your answer to question 7 is "YES," you have found a verdict in favor of the plaintiffs and against the defendants James Dowling and the Town of Smithtown for the time period from March 6, 1992 to April 6, 1992.

In either case, please answer question 8.

April 6, 1992 Permit

8. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling knew on April 6, 1992 that the plaintiffs did not have their own water supply?

YES __X__ NO _____

If your answer to question 8 is "NO," please answer question 12.
If your answer to question 8 is "YES," please answer question 9.

(*footnote continued*)

jury further found that Dowling had an improper motive for voiding the permit, refusing to issue another permit, and attaching unreasonable conditions to the permits of March 6 and April 6. This motive was to compel Robert Walz to deed a portion of his property to Smithtown. The jury awarded a total of $102,000 in compensatory damages against Smithtown and Dowling and $9,500 in punitive damages against Dowling. The district court then awarded $48,276 in attorney's fees.

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9. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling knew that the conditions placed on the April 6, 1992 permit were improper and unreasonable?

YES __X__ NO _____

If your answer to question 9 is "NO," please answer question 12.
If your answer to question 9 is "YES," please answer question 10.

10. Did the plaintiffs prove, by a preponderance of the evidence, that the defendant James Dowling placed the conditions on the April 6, 1992 permit to intentionally prevent the Suffolk County Water Authority from connecting the Walz property to the water main?

YES __X__ NO _____

If your answer to question 10 is "NO," please answer question 12.
If your answer to question 10 is "YES," please answer question 11.

11. Did the plaintiff's prove, by a preponderance of the evidence, that the defendant James Dowling placed the conditions on the April 6, 1992 permit because of an improper motive, namely, to compel the plaintiff Robert Walz to deed a portion of his property to the Town of Smithtown?

YES __X__ NO _____

If your answer to question 11 is "NO," you have found a verdict in favor of the defendants James Dowling and the Town of Smithtown for the time period from April 6, 1992 to April 28, 1992.

If your answer to question 11 is "YES," you have found a verdict in favor of the plaintiffs and against the defendants James Dowling and the Town of Smithtown for the time period from April 6, 1992 to April 28, 1992.

DISCUSSION

On appeal, Smithtown and Dowling[2] contend that: (i) the Walzes have no constitutionally protected property interest at stake; (ii) any such property interest would be subject only to procedural, rather than substantive, due process protection; (iii) Dowling is protected by qualified immunity; (iv) the district court erred by allowing the jury to award compensatory damages based upon emotional distress and pain and suffering and the jury award is excessive; and (v) the district court erred in calculating attorney's fees.

A. *The Existence of a Protected Property Right*

The district court held that there is a fundamental right to water supply protected by the Due Process Clause. This is a novel ruling. We may take judicial notice of the fact that a multitude of local governments do not supply water to their residents, and there is no authority suggesting that these governmental units are in violation of the Constitution. To be sure, a denial of water supply to one resident while providing it to others in similar circumstances, or, as here, an exacting in the case of one applicant of onerous and extortionate conditions that were unrelated to the merits of the application, might give rise to an Equal Protection claim, *see Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (Equal Protection clause "is essentially a direction that all persons similarly situated should be treated alike."), but no such claim was pleaded in this action.

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[2] Appellants have not raised the issue of whether the municipality of Smithtown can, on these facts, be held liable under Section 1983 but have in effect conceded that if Dowling is liable, then Smithtown is also.

However, we need not address this issue. Whether the Walzes had a property right was resolved as a matter of law, and the special interrogatories submitted to the jury focused upon Dowling's conduct in voiding the original excavation permit and refusing later to issue an unconditional permit.[3] See Note 1, *supra*. If the Walzes had, as a matter of law, a property interest in the issuance of an excavation permit, the district court's reliance upon a supposed property right in water supply would not affect the jury's verdict, although the deprivation of water supply would be relevant to damages. Because we believe that the Walzes had a property right in an excavation permit, we need not reach the issue of a right to water supply.

When an unsuccessful applicant for a governmental permit claims that an official or regulatory body has violated due process, the framework for evaluating the claim is the well-developed property interest analysis, which has its origins in the Supreme Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The focus of this analysis is on the nature of the applicant's interest in the approval being sought, specifically whether the applicant has a clear entitlement to the approval sought from the government official or administrative body. *See, e.g., RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911 (2d Cir.) (analyzing whether applicant possessed property interest in building permit), *cert. denied*, 493 U.S. 893 (1989); *Sullivan v. Town of Salem*, 805 F.2d 81, 84-85

[3] Although the Suffolk County Water Authority was the applicant for purposes of the Smithtown Code, the Walzes were, under New York law, the party-in-interest with regard to the application, as reflected in their standing to bring an Article 78 proceeding to enforce that Code. Therefore, the Walzes are entitled to bring a claim for damages stemming from the failure by Dowling to issue the permit to the Water Authority.

(2d Cir. 1986) (analyzing whether applicant possessed property interest in certificate of occupancy); *Yale Auto Parts v. Johnson*, 758 F.2d 54, 58-60 (2d Cir. 1985) (analyzing whether applicant possessed property interest in permit to use property as automobile junkyard).

In *Yale Auto Parts*, 758 F.2d at 59, we stated that a "legitimate claim of entitlement" exists where, "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." This test focuses on the amount of discretion committed to the issuing authority, not the estimated probability that the authority would act favorably in a particular case. *See RRI Realty*, 870 F.2d at 918. As we observed in *RRI Realty*, "[t]he 'strong likelihood' aspect of *Yale Auto Parts* comes into play only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured; an entitlement does not arise simply because it is likely that broad discretion will be favorably exercised." *Id.* Put another way, "[t]he fact that the permit could have been denied on non-arbitrary grounds defeats the federal due process claim." *Id.*

The standards governing the granting of permits for street excavations is set forth in Article IV of Chapter 245 of the Smithtown Code. Section 245-16 provides, in relevant part:

> A. Applications, in writing, shall be filed with the Superintendent of Highways upon application blanks which he shall provide or in such other manner as he shall prescribe, which applications shall state the nature, location, extent and purpose of the proposed excavations.

> B. Applications by public service companies, excluding municipal districts, must be accompanied by a general undertaking in such form as may be approved by the Town Board. Said general undertaking is tendered to assure that, after completing the excavation, said applicant leaves the street, highway or sidewalk, pavement, curb or gutter in the same condition it was prior to excavation.
>
> * * *
>
> D. Upon compliance with the foregoing requirements, a permit shall be issued in the name of the Superintendent of Highways of the Town of Smithtown.

We believe the discretion of the Superintendent of Highways to deny an excavation permit is so circumscribed that the Walzes possessed an entitlement to a permit. So long as an application form states "the nature, location, extent and purpose of the proposed excavations," the Superintendent of Highways has no discretion to decline to issue a permit. The Smithtown Code thus states, "a permit shall be issued." The only apparent ground for declining an excavation permit to a public utility is that the application did not provide all the designated information. Under such circumstances, the denial is not an exercise of discretion but the result of the fact that the applicant has not fulfilled the express requirements of the Code. In sum, no discretion existed for Dowling to void the permit, or to refuse to issue another permit. We therefore conclude that the Walzes had a property right in receiving an excavation permit from Dowling.

B. *Substantive Due Process and Property Rights*

We turn now to the question of whether property rights in governmental permits are subject to substantive, as well as procedural, due process. The Walzes make no claim that New York fails to provide procedural safeguards for their right to an excavation permit Indeed, they availed themselves of those safeguards b bringing an Article 78 proceeding. Rather, they clai i that they have a substantive due process right not to l e subject to an arbitrary and capricious denial of an excavation permit. Appellants argue that the Walzes' sole due process rights lie in the guaranty of procedural safeguards.

Although not yet addressed by the Supreme Court, *see Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 222-23 (1985), the issue of whether substantive due process protects state-created property rights is resolved by precedents in this circuit that must be followed by a panel of this court. In *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988), we expressly recognized with regard to the rights of landowners the distinction between procedural due process and substantive due process. We held that the landowner in question in that case was accorded adequate procedural safeguards, *id.* at 211, but that a remand was necessary to determine whether a local zoning board denied a permit because of arbitrary or irrational reasons, *id.* at 216. The remand was thus based on substantive due process. *Id.* at 211-216. There is some suggestion in *RRI Realty* that *Brady* and our earlier decision in *Sullivan* might be more properly based on "the owner's indisputable property interest in the land" rather than on a *Roth* analysis. *See RRI Realty*, 870 F.2d at 917. Nevertheless, *Brady* employed *Roth* in remanding, and, even if what is at stake is the Walzes'

property interest in their land, that analysis would not, given the jury's answers to the special interrogatories, see Note 1 *supra*, alter the outcome in the instant matter. As landowners, the Walzes surely had a right not to be compelled to convey some of their land in order to obtain utility service. *See Dolan v. City of Tigard*, 114 S.Ct. 2309, 2317 (1994) (absence of nexus between permit condition and legitimate state interest converts valid land regulation into an "out-and-out plan of extortion").

C. *Qualified Immunity*

Appellants challenge also the district court's ruling that Dowling was not entitled to qualified immunity. The argument is entirely without merit.

Qualified immunity "shields government officials from liability for damages on account of their performance of discretionary official functions." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 531 (2d Cir. 1993). However, by conditioning the issuance of a permit on the conveyance of land, Dowling was not exercising a discretionary function but simply refusing to perform a ministerial act until a demand with absolutely no basis in legal authority was met.

Qualified immunity exists " 'to protect officials who are required to exercise their discretion' " and to encourage " 'the vigorous exercise of official authority.' " *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). Regardless of any doubts as to whether his conduct violated due process, Dowling could not have believed, as a matter of equal protection or simply of the laws of the town, that he had discretion to deny an excavation permit to the Walzes as a means of extorting land from them. Indeed,

appellants offer no authority whatsoever that might have led Dowling to believe otherwise. He is, therefore, as a matter of law not entitled to qualified immunity. *See Harlow*, 457 U.S. at 816 (observing that qualified immunity is unavailable for ministerial tasks); *Kaminsky v. Rosenblum*, 929 F.2d 922, 925 (2d Cir. 1991) (holding that qualified immunity doctrine applies where government official performs discretionary function, as distinct from ministerial function); *see also Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984) (discussing ministerial duty exception to qualified immunity).

D. *Damages*

Appellants next contend that the district court erred by allowing the jury to award compensatory damages based upon emotional distress and pain and suffering. However, "[i]t is settled that a court may award damages for emotional suffering in a § 1983 case." *See Miner v. City of Glens Falls*, 999 F.2d 655, 662 (2d Cir. 1993); *see also Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993) ("It is axiomatic that civil rights plaintiffs may recover compensatory damages for emotional distress."). The Walzes presented evidence of emotional distress to the jury. Mrs. Walz testified that she was "shocked" by her telephone conversation with Dowling on January 17, 1992. Mr. Walz testified that he became so upset when he found out about Dowling's threat that he started shaking. The jury was entitled to credit this testimony. *See Miner*, 999 F.2d at 662-63 (upholding jury award for emotional distress based upon testimony of plaintiff and his spouse). Furthermore, the jury was entitled to award damages for the Walzes' distress and discomfort at being without water for a protracted period.

Appellants further contend that the jury awards are excessive. However, "[i]t is well settled that calculation of damages is the province of the jury." *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990). "[T]he standard of appellate review of damage awards, whether compensatory or punitive, is whether the award is so high as to shock the judicial conscience and constitute a denial of justice." *Id.* (citations omitted). The jury awarded compensatory damages in the amount of $40,800 to Robert Walz, $40,800 to Lana Sue Walz, and $20,400 to Robert Walz, Jr. We do not find these amounts to be excessive. We have upheld larger awards for mental distress stemming from a constitutional tort, *see id.* at 187, and these awards include compensation for the inconvenience and hardship suffered by the Walzes because their home lacked running water. Nor do we find the punitive damage award of $9,500 to be excessive. *See id.* (upholding $150,000 punitive damage award).

E. *Attorney's Fees*

Finally, appellants challenge the award of attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. We review the district court's award for abuse of discretion, *see Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), bearing in mind the high degree of deference owed to the district court, *see Mautner v. Hirsch*, 32 F.3d 37, 39 (2d Cir. 1994).

We believe that the fee award of $48,276 was reasonable, both in terms of the hourly rate and the number of hours expended on the litigation. Moreover, the application in support of the fee request contained adequate documentation. We note that the district court properly excluded compensation for work performed in connec-

tion with litigating against the defendant Water Authority, which the jury found not liable.

Appellants contend that the district court's failure to hold an evidentiary hearing before making a fee award of this magnitude violated their right to due process. However, awards of comparable size are routinely made without an evidentiary hearing, *cf. Hensley*, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation."), and we are informed of nothing that would be developed in such a hearing that would alter the outcome.

Affirmed.

TRANSCRIPT OF ORAL DECISION
OF HON. ARTHUR D. SPATT
RENDERED ON NOVEMBER 19, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ROBERT WALZ, LANA SUE WALZ, and ROBERT WALZ, JR.,

Plaintiffs, CV 92-2397

- against - United States Courthouse

TOWN OF SMITHTOWN and JAMES DOWLING, PERSONALLY and as SUPERINTENDENT OF HIGHWAYS OF THE TOWN OF SMITHTOWN, Uniondale, NY

Defendants. November 19, 1993

----------x 9:00 o'clock a.m.

* * *

THE COURT: This is the decision of the Court:

After a trial on November 10, 1993, the jury in this case returned a

verdict in favor of the plaintiffs, Robert Walz, Lana Sue Walz and Robert Walz, Junior, and against the defendants, the Town of Smithtown, and James Dowling personally and as Superintendent of Highways of the Town of Smithtown.

Since the jury also found a verdict in favor of the defendant Suffolk County Water Authority as to any liability, the present motion is solely addressed to the plaintiffs' application for attorney fees as against the defendants who were found to be liable to the plaintiffs, namely the defendants Town of Smithtown, James Dowling personally and as Superintendent of Highways of the Town of Smithtown.

The facts of this case are by now familiar to the Court. On or about

December 25, 1991, the well on the property owned by the plaintiff Robert Walz in which all three plaintiffs reside, stopped functioning. After a failed attempt to repair the well, the plaintiffs contacted the Suffolk County Water Authority to arrange to have the plaintiffs property, located on Ketchum Avenue in St. James, New York, connected to the water main which is located under the road surface of Ketchum Avenue.

On January 16, 1992, the plaintiffs paid a fee of eleven hundred dollars to the Water Authority for the connection of their home to the main water line in the adjacent street. On that same day, the Water Authority contacted the Highway Department of the Town of Smithtown to obtain an emergency

road opening permit to enable the Water Authority to connect the Walzes' property to the main water line. A verbal consent was obtained that day from Ms. Dowling, of the office of the highway superintendent.

On January 17, 1992 after initially signing the clearly marked emergency permit, the defendant James Dowling, the Superintendent of the Highway Department, of the Town of Smithtown voided the permit. He then called the plaintiffs' home, spoke to Mrs. Walz, and asked her to give to the Town a 15 foot strip of their property. He then sent over by messenger a deed that day to the Walzes for them to sign over their property. This was rejected by the Walzes and triggered a series of

events which resulted in the plaintiffs being totally deprived of a water supply for, approximately, three and a half months.

The jury found that, "the defendant James Dowling knew on January 17, 1992 that the plaintiffs did not have their own water supply."

Further the jury determined that, "James Dowling voided the January 17, 1992 permit. . . to intentionally deprive the plaintiffs of a water supply on their property end".

These are all from the verdict sheet questions, and that the avoiding of, "the January 17, 1992-- I guess that is a mistake-- permit was because of an improper motive, namely to compel the plaintiff Robert Walz to deed a portion

of his property to the Town of Smithtown".

Those are all verdict sheet answers by the jury.

After the initial emergency permit was voided, and the plaintiffs rejected Dowling's request to obtain part of their property, the defendant Dowling went on a vacation to Puerto Rico and returned, approximately, one month later. During this period, of course, the plaintiffs had no water.

On March 6th, 1992 he issued a second permit for the road opening. This permit which actually is the first one, the first one was voided so this was the first real permit. This permit which was introduced into evidence as Plaintiff's Exhibit 14 contained many conditions and

required a fee of three thousand six hundred and seventy-seven dollars and fifty cents. Which is more than one hundred times the normal fee of thirty-five dollars. According to Aniella Dowling, the secretary and also daughter-in-law of the defendant James Dowling, this was the only time that these types of conditions were included on a road opening permit.

In addressing this March 6th, 1992 permit, the jury determined, "that the defendant James Dowling knew that the conditions placed on the March 6th, 1992 permit were improper and unreasonable". Further, the jury found that, "the defendant James Dowling placed the conditions on the March 6th, 1992 permit to intentionally prevent the Suffolk

County Water Authority from connecting the Walzes' property to the water main", and that, "the defendant James Dowling placed the conditions on the March 6th, 1992 permit because of an improper motive, namely to compel the plaintiff, Robert Walz, to deed a portion of his property to the Town of Smithtown". Those are all verdict sheet answers.

On April 6th, 1992, the defendant, James Dowling, issued a second permit for the road opening. This permit, which was introduced into evidence as Plaintiff's Exhibit 15, contained all the conditions placed on the March 6th, 1992 permit with the exception of the curbing. In addressing this permit the jury determined, "that the defendant, James Dowling, knew that

the conditions placed on the April 6th, 992 permit were improper and unreasonable". Further, the jury found that, "the defendant, James Dowling, placed the conditions on the April 6th, 1992 permit to intentionally prevent the Suffolk County Water Authority from connecting the Walz property to the water main", and that "the defendant James Dowling placed the conditions on the April 6th, 1992 permit because of an improper motive, namely to compel the plaintiff, Robert Walz, to deed a portion of his property to the Town of Smithtown". Those are all jury verdict question answers.

Based upon the above findings by the jury, and let me say that in the Court's view, as I stated previously at the end

of the case, this verdict is amply supported by the evidence, based upon the above findings by the jury, the jury determined that the defendants Town of Smithtown and James Dowling violated 42 United States Code, Section 1983 by depriving the plaintiffs of substantive due process rights, property rights, guaranteed by the Fourteenth Amendment. The jury awarded the plaintiffs compensatory damages in the following total amounts:

Robert Walz, forty thousand eight hundred dollars.

Lana Sue Walz, forty thousand eight hundred dollars.

Robert Walz, Junior, twenty thousand four hundred dollars.

In addition, the jury awarded the

plaintiffs punitive damages against the defendant James Dowling in his individual capacity in the amount of nine thousand five hundred dollars. Counsel for the plaintiffs now moves for prevailing party attorney's fees, pursuant to 42 United States Code, Section 1988.

"The general 'American Rule' is that the prevailing party in federal court litigation is not entitled to recover legal fees incurred in the conduct of that litigation." That is from United States against 110-118 Riverside Tenants Corp., which was decided by the Second Circuit on September 28, 1993, sitting Aleyeska Pipeline Service Company versus Wilderness Society, 421 U.S. 240. The laws governing civil rights cases provide that, "in an axe or preceding to enforce

a provision of Section 1983, the Court in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost". That's from 42 United States Code, Section 1988(b).

Recently the "automatic" nature of the recovery of attorney's fees for a prevailing plaintiff in a civil rights case changed when the United States Supreme Court stated that, "in some circumstances, even a plaintiff who formally 'prevails' under Section 1988 should receive no attorney's fees at all", and that's, of course, Farrar against Hobby, 113, Supreme Court 566, decided in 1992.

The Farrar case is especially true where only nominal damages have been

recovered. The test for whether a plaintiff qualifies as a prevailing party in a civil rights case for the purposes of recovering attorney's fees, pursuant to 42 United States Code, Section 1988 is as follows, and this is from Farrar:

"To qualify as a prevailing party a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought...Whatever relief the plaintiffs secure must directly benefit him at the time of the judgment or settlement... Only under these circumstances can civil rights litigation effect the material alteration of the legal relationship of the parties and transfer the plaintiff

into a prevailing party...In short a plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff". That is from Farrar, 113 Supreme Court, at page 573.

In the present case, since the verdict clearly establishes that the action of the defendants Town of Smithtown and James Dowling violated the substantive due process components of the Fourteenth Amendment, namely the acts were some [sic] egregious and shocked the conscience of the community, and the verdict directly monetarily benefits the plaintiffs, the Court finds that the plaintiffs are prevailing parties to this

action. Once the Court determines that a prevailing plaintiff is entitled to attorney's fees, the Court must determine the appropriate fee award.

Now, I'm going to calculate the attorney's fees. The amount of award of attorney's fees in a civil rights case is determined by using the "lodestar" method, Banchard against Bergeron, 489 U.S. 87, 1989. Also see Hensley against Eckerhart, 461 U.S. 424. The amount of the fee award is initially estimated by multiplying the number of hours, reasonably expended on the litigation, by a reasonably hourly rate Pennsylvania against Delaware, 478 U.S. 546. According to the Supreme Court, a reasonable attorneys' fee:

"Is one calculated on the basis of

rates and practices prevailing in the market, namely, in line with those rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation, citation omitted, and one that grants the successful civil rights plaintiff a 'fully compensatory fee', citation omitted, comparable to what is traditional with attorneys compensated by a fee paying client". Missouri against Jenkins, 491 U.S. 274, see also Blum against Stenson, 465, United States 886, footnote eleven. The amount of award, however, must ultimately be determined on the facts of the case.

The Second Circuit has noted a particular applicability in determining the amount of award of an attorney fees

in a civil rights case, are the twelve factors set forth by the Fifth Circuit in Johnson against Georgia Highway Express Inc., 488 F. 2d 714, Fifth Circuit, 1974. As stated by the Second Circuit in United States Football League against National football league, 887, F. 2d, 408, Second Circuit, 1989 cert denied, 493 U.S. 1071.

I'm not going to go through these eleven circuit factors. They are set forth in the decisions and I also note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. That from United States Football league, at page 415.

Pursuant to 42 United States Code, Section 1988 the plaintiff is seeking attorney fees in the total sum of sixty-

two thousand four hundred and eighty-two dollars and fifty cents. This amount is based upon time sheets indicating a total of 277.7 hours expended on this case, with an hourly billing rate of two hundred and twenty-five dollars per hour for plaintiff's counsel.

Now, let's talk about the hourly rate. Prevailing parties, "are entitled to reasonable hourly rates which fall within the prevailing market place rates in the community for similar services by lawyers of reasonable comparable skill, experience and reputation". New York State National Organization for Women against Terry, 737 F. Supp, 1350, affirmed and reversed in part, 961 F. 2d 390, Second Circuit 1992.

In this regard the Court reviews the

background of plaintiff's counsel, William D. Wexler, Esq., and I find that after graduating from law school, Mr. Wexler served for seven years as an assistant District Attorney and special assistant assistant District Attorney for the Suffolk County District Attorney's Office. After leaving the Suffolk County District Attorney's Office, he was employed by the Suffolk County Attorney's office in the Federal Litigation Bureau, where he represented the Suffolk County Police Department and the Suffolk County District Attorney's Office in the federal court with regard to civil rights violations in cases similar to this, not the same kind, but he also apparently worked on numerous civil rights cases and tried cases before a number of judges in

this court and other courts.

The Court has reviewed the applicable law in this circuit and determines that based upon the type of work performed and the experience of the attorney, the following maximum rates are reasonable: For partners no more than two hundred dollars per hour; for associates no more than one hundred and thirty-five dollars per hour. In this regard see Huntington Branch NAACP against Town of Huntington, 749 F. Supp, 62, Eastern District of New York, 1990, wherein a rate of one hundred and thirty-five to two hundred and twenty-five dollars per hour was appropriate in housing discrimination cases where counsel performed "extremely ably" and had experience in civil rights cases.

See also Clarke against Frank, Eastern District of New York, 1991, a two hundred dollar per hour rate reasonable in civil rights cases. See also Jennette against New York, 800 F. Supp, 1165, Southern District of New York, 1992, sole practitioner with ten years experience in civil rights actions awarded two hundred dollars per hour. See also Nu-Life Construction against Board of Education, which was one of my cases, 795, F. Supp, 602 Eastern District of New York, 1992, where counsel were awarded fees of rates of one hundred and sixty five to two hundred dollars per hour in a RICO case and other cases which I don't have to go into now. Many other cases.

Accordingly, since the plaintiff's counsel is a sole practitioner in Suffolk

County, in this Court's view he is entitled to be compensated at two hundred dollars per hour for his work on this case.

Now, about the work performed. Central to an application for attorney's fees is the submission of time records reflecting the hours expended by counsel in pursuing the successful claims of their client. In order for a party to recover attorney's fees, such time records must be made contemporaneously with the associated work. See Lewis against Coughlin, 801 F. 2d, 570, 2d Circuit 1986.

Furthermore, "these records should specify for each attorney the date, the hours expended and the nature of the work done". New York State Association for

Retarded Children against Carey, 711 F. 2d, 1136, Second Circuit 1093. "The burden is on counsel to keep and present records from which the Court may determine the nature of the work done, the need for it, and the amount of time reasonably required; where adequate contemporaneous records have not been kept, the Court should not award the full amount requested". F.H. Krear, against Nineteen named Trustees, 810, F. 2d, 1250, Second Circuit, 1987.

In support of the plaintiffs' fee application, counsel for the plaintiffs submitted a listing of dates for each item of work performed on the case, the description of the work performed and the time expended for each item of work. The Court must examined the description of

the work performed, because while vague descriptions are not fatal to a fee application, courts in this circuit have reduced fee awards due to the lack of specificity in time records. See United States Football League, supra, New York State Association for Retarded Children, supra, Nu-Life Construction Corporation, supra, et cetera.

In the present case the Court believes that the description of the work performed by plaintiff's counsel is sufficiently particular to establish the work performed. The plaintiff's counsel submitted time records substantiating a fee based upon 277.7 hours of work performed. However, this represents the lawsuit against the defendant Suffolk County Water Authority as well as the

action against the Town of Smithtown and Dowling.

According to the Second Circuit, "work that is based on different facts and legal theories than a successful one may not be included in the fee awarded". That from United States Football League, at page 413. In a case where various claims against different defendants may be based upon a common set of facts, or similar legal theories a district court:

"Should focus on the significance of the overall relief obtained by the plaintiff, where a plaintiff has achieved only partial or limited success, full compensation of attorney fees would not be reasonable. The district court may either attempt to identify specific hours that should be eliminated or may simply

reduce the award to account for the limited success". That's from the United States Football League, at page 414.

Now, the defendants properly assert that some of the time records described work performed solely in conjunction with the case against the Suffolk Water Authority. The portion specifically referable to the Suffolk County Water Authority, I'm not going to itemize them. I have this here and it will be put it in the short form order, amount 9.5 hours, that was work done with regard to the Suffolk County Water Authority. Since this 9.5 hours are clearly related to the action against the Suffolk County Water Authority the Court will not include this time in the award of attorney's fees against the defendants Town of Smithtown

and Dowling.

Accordingly, the total 277.7 hours must be reduced by 9.5 hours leaving a new total of 268.2 hours. When multiplying 268.2 hours by the hourly rate of two hundred dollars, the total amount is fifty-three thousand six hundred and forty dollars. However, this total also represents a portion of plaintiffs' counsel's efforts in prosecuting the case against the defendant Water Authority. The plaintiffs cannot recover attorney's fees for the unsuccessful claim against the defendant Suffolk County Water Authority.

Because the Court already eliminated those portions of the time record specifically referable to the case

against the Water Authority, it is the Court's opinion that the lodestar amount should be reduced by a factor of ten percent to represent that portion of the "undivided" remaining fee which the Court allocates to the axe against the Water Authority which was unsuccessful.

Accordingly the attorney's fees of fifty-three thousand six hundred and forty dollars are reduced by a factor of ten percent, or five thousand three hundred and sixty-four dollars which represents that portion allocated by the Court to the prosecution of the action against the defendant Suffolk County Water Authority.

Conclusion: Based upon the foregoing, the plaintiffs' motion for prevailing party attorney fees pursuant

to 42 United States Code, Section 1988 is granted, and the plaintiff is awarded the additional sum for the total sum of forty-eight thousand two hundred and seventy-six dollars as his attorney's fees.

The Clerk of the Court is directed to enter a judgment in accordance with the verdict, the supplemental verdict and this decision against the defendants Town of Smithtown and James Dowling individually in the following amounts:

As to the plaintiff, Robert Walz, forty thousand eight hundred dollars.

As to the plaintiff, Lana Sue Walz, forty thousand eight hundred dollars.

As to the plaintiff, Robert Walz, Junior twenty thousand four hundred dollars.

These three awards are against all the defendants.

With regard to punitive damages against James Dowling individually nine thousand five hundred dollars. And attorney fees on behalf of all three plaintiffs against all the defendants in the sum of forty-eight thousand two hundred and seventy-six dollars.

The total I come to is one hundred and fifty-nine thousand seven hundred and seventy-six dollars and the clerk is directed to enter judgment accordingly.

Thank you very much, counsel.

****

ORDER OF THE HON. ARTHUR D. SPATT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Plaintiffs,

- against - ORDER

TOWN OF SMITHTOWN and JAMES DOWLING, PERSONALLY and as SUPERINTENDENT OF HIGHWAYS OF THE TOWN OF SMITHTOWN, CV 92-2397 (ADS)

Defendants.
----------x

After the trial of the above action, the jury returned a verdict on November 10, 1993 in favor of the plaintiffs Robert Walz, Lana Sue Walz, and Robert Walz, Jr. and against the defendants Town of Smithtown and James Dowling. In addition, the jury returned a verdict in favor of the defendant Sufolk County Water Authority. Counsel for the

plaintiffs now moves for prevailing party attorney's fees pursuant to 42 U.S.C. § 1988 against the defendants Town of Smithtown and James Dowling.

On November 19, 1993 the Court rendered its decision on the above motion, on the record, however stating that the itemization of the 9.5 hours of billable time which the Court excluded from the award because it specifically referred to the case against the Suffolk County Water Authority would be set forth in this Written ORDER. Those time entries are as follows:

7/20/92	RRA of Answer of defendant SCWA	.5
1/11/93	Attend conference before Mag. Orenstein re: scheduling	3.0

	Telephone conference with G. Brunges re: failure to appear	.3
	Telephone conference with C. Malafi re: order for default	.2
1/12/93	Research Fed. R. Civ. P. re Magistrate's recommendation to district judge re dismissing answer	2.2
2/5/93	RRA order re: striking SCWA answer	.3
2/8/93	Attend Mag. Orenstein for hearing re: SCWA's default for failure to appear	3.0
	TOTAL	9.5

Having reviewed the papers submitted by the parties, having considered the position of the parties at oral argument on November 19, 1993, and for the reasons

stated on the record during oral argument, it is hereby

ORDERED, that the plaintiffs' motion for prevailing party attorney's fees, pursuant to 42 U.S.C. § 1988, is granted and the plaintiffs are awarded the additional sum of $48,276.00 as attorney's fees, and it is further

ORDERED, that the Clerk of the Court enter judgment in accordance with the verdict, supplemental verdict, and this decision, in the total amount of $159,776.00, as follows:

1) Compensatory damages against the defendants Town of Smithtown and James Dowling, individually and as Superintendent of the Highway Department of the Town of Smithtown, in the following amounts:

Robert Walz	$40,800.00
Lana Sue Walz	40,800.00
Robert Walz, Jr.	20,400.00

2) Punitive damages against the defendant James Dowling, in his individual capacity, and in favor of all plaintiffs, in the amount of $9,500.00; and

3) Attorney's fees against the defendants Town of Smithtown and James Dowling, individually and as Superintendent of the Highway Department of the Town of Smithtown, and in favor of all plaintiffs, in the amount of $48,276.00.

The Clerk of the Court is advised that this action closes the case.

SO ORDERED.

Dated: Uniondale, New York
November 19, 1993

ARTHUR D. SPATT
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of March, one thousand nine hundred and ninety-five.

ROBERT WALZ, LANA SUE WALZ, and ROBERT WALZ, JR.,

Plaintiffs,

- against -

Docket No. 94-7268

TOWN OF SMITHTOWN and JAMES DOWLING, PERSONALLY and as SUPERINTENDENT OF HIGHWAYS OF THE TOWN OF SMITHTOWN,

Defendants.

A petition for rehearing contained a suggestion that the action be reheard in banc having been filed herein by the appellants Town of Smithtown, et al.

Upon consideration by the panel that

decided the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III,
Clerk

By: Carolin Clark Campbell
Chief Deputy Clerk.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Plaintiffs,

- against -

AMENDED JUDGMENT

TOWN OF SMITHTOWN and JAMES DOWLING, PERSONALLY and as SUPERINTENDENT OF HIGHWAYS OF THE TOWN OF SMITHTOWN,

CV 92-2397 (ADS)

Defendants.
----------x

After the trial of the above action, the jury returned a verdict on November 10, 1993, in favor of the plaintiffs Robert Walz, Lana Sue Walz, and Robert Walz, Jr. and against the defendants, Town of Smithtown and James Dowling. In addition, the jury returned a verdict in favor of the defendant Suffolk County Water Authority. Counsel for the plaintiffs thereafter moved for

prevailing party attorney's fees pursuant to 42 U.S.C. §1988 against the defendants Town of Smithtown and James Dowling. The Court heard oral argument on November 19, 1993 and rendered its decision on the above motion on the record. An order of the Hon. Arthur D. Spatt, United States District Judge, was filed on November 22, 1993, granting the plaintiffs' motion for prevailing party attorney's fees, pursuant to 42 U.S.C. §1988, and directing the Clerk of the Court to enter judgment accordingly, which was entered on November 30, 1993. A notice of appeal on behalf of defendants, Town of Smithtown and James Dowling was entered on December 7, 1993. By letter dated January 28, 1994 counsel for defendants noted that the appeal taken from the

November 30, 1993 judgment had been withdrawn because that judgment failed to recite what disposition had been made with respect to the cross-claims which had been asserted in the answers of the Suffolk County Water Authority, the Town of Smithtown and James Dowling, and requested that the Court enter an order directing the Clerk to enter a final judgment in this action disposing of the defendant's cross-claims as well as the plaintiff's claims against the defendants. The Court having entered an order dated February 1, 1994 granting Mr. Sheridan's letter request, it is

ORDERED and ADJUDGED that the judgment entered on November 30, 1993 is hereby amended; that the plaintiffs take nothing of the defendant Suffolk County

Water Authority; that judgment is hereby entered as follows:

1) in favor of the plaintiffs, Robert Walz, Lana Sue Walz, Robert Walz, Jr., for compensatory damages against the defendants Town of Smithtown and James Dowling, individually and as Superintendent of the Highway Department of the Town of Smithtown, in the following amounts:

Robert Walz	$40,800.00
Lana Sue Walz	40,800.00
Robert Walz, Jr.	20,400.00;

2) in favor of all plaintiffs Robert Walz, Lana Sue Walz and Robert Walz, Jr., for punitive damages against the defendant James Dowling, in his individual capacity, in the amount of $9,500.00;

3) in favor of all plaintiffs, Robert Walz, Lana Sue Walz, Robert Walz, Jr., for attorney's fees against the defendants Town of Smithtown and James Dowling, individually and as Superintendent of the Highway Department of the Town of Smithtown, in the amount of $48,276.00; for a total sum of $159,776.00; and it is further

ORDERED and ADJUDGED that the cross-claims of the defendants, James Dowling, Town of Smithtown and Suffolk County Water Authority are hereby dismissed.

Dated: Uniondale, New York
February 18, 1994

ROBERT C. HEINEMAN
Clerk of the Court

By:_____
JOSEPH DI TALIA
Deputy Clerk in Charge

RECEIVED
MAY 19 1995
OFFICE OF THE CLERK

No. 94-1721

In The

Supreme Court of the United States

October Term, 1994

TOWN OF SMITHTOWN and JAMES DOWLING,

Petitioners,

vs.

ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that respondents stated a claim for violation of their rights to substantive due process under 42 U.S.C. § 1983 based upon a deprivation of water supply service to their home by the refusal of a town official to issue an excavation permit for a public street, where issuance of such permit was conditioned upon respondents conveying a portion of their property to the town for no consideration.

2. Whether the Second Circuit correctly held that petitioner James Dowling was not entitled to qualified immunity for refusing to perform a ministerial task based on a clearly improper motive.

3. Whether the Second Circuit correctly held that the damages awarded to respondents were neither unauthorized nor excessive.

4. Whether the Second Circuit correctly held that the award of attorney's fees to respondents was reasonable in all respects.

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No. 94-1721

In The

Supreme Court of the United States

October Term, 1994

TOWN OF SMITHTOWN and JAMES DOWLING,

Petitioners,

vs.

ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Robert Walz, Lana Sue Walz and Robert Walz, Jr. respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Second Circuit's opinion below. That opinion is reported at 46 F.3d 162 (2d Cir. 1995) and is reproduced in the petition for writ of certiorari at Appendix A.

COUNTER STATEMENT OF THE CASE

Respondents Robert Walz, Lana Sue Walz and Robert Walz, Jr. ("respondents" collectively) brought this action under 42 U.S.C. § 1983 against petitioners the Town of Smithtown, New

York and its Superintendent of Highways, James Dowling, based upon a denial of public water service caused by Dowling's refusal to issue a permit allowing the county Water Authority to excavate a public street in order to connect respondents' home to the public water system. The complaint alleged, and the jury following trial specifically found, that petitioner Dowling's refusal to issue the requisite permit was intended to coerce respondents to convey a portion of their land to the Town of Smithtown.

Respondents own a home in Smithtown, New York which was serviced by well water until the early winter of 1991-1992, when the well went dry. In early January of 1992, respondents applied to the Suffolk County Water Authority for public water service. Since they were without any water service, respondents expeditiously complied with the Water Authority's requirements, which included digging a trench on the property and paying a fee of $1,100. The only prerequisite remaining prior to connecting respondents to public water service was an excavation permit to be issued by the petitioner Town of Smithtown.[1]

Given the fact that respondents were without water service (and therefore heat) during the winter, the Water Authority made an emergency application for the excavation permit by telephoning the Town of Smithtown Highway Department.[2] Upon receiving the call, a clerk at the Highway Department prepared a permit which indicated on its face that it was for "EMERGENCY Water Service", and stated that verbal approval was issued that same day. On the following day, petitioner Dowling initially signed the permit, and thereafter voided the

1. The relevant portion of the Smithtown Code which directs, among other things, that the Superintendent of Highways "shall" issue a permit is reproduced in the decision below at 46 F.3d at 168.

2. Such a procedure is utilized by the Water Authority and the town to expedite water service to homeowners in similar situations.

permit. The Water Authority was then made aware that the permit was void, despite the fact that petitioner Dowling knew that respondents were without water and heat.

After voiding the emergency permit, petitioner Dowling telephoned respondent Lana Sue Walz and inquired as to whether respondents would deed 2,250 square feet of their property to Smithtown in order to widen the road. At that time, petitioner informed respondents that they would not receive water service until the land was conveyed to the Town. The Water Authority was unable to assist respondents in this regard.

Within two hours after Dowling's telephone call to the respondents, a Highway Department employee brought a deed prepared by Dowling seeking to convey the property sought by Dowling. However, respondents informed Dowling that they would not donate land in order to obtain water service. The following day, Dowling left for a month-long vacation, with knowledge of respondents' predicament. Only after returning from his vacation did Dowling seek assistance of the Town Attorney in order to obtain the property he sought from respondents.

Thereafter, respondents sought relief by way of a state court proceeding to compel the issuance of an excavation permit. Prior to that, Dowling issued a permit which included a list of unprecedented special requirements which, the evidence at trial demonstrated, had never before been imposed upon such a permit for a similar purpose.[3] The state court determined that one of the

---

3. Among the special requirements indicated on the permit was the posting of a $3,678 cash bond. As the Second Circuit observed, "[t]he typical excavation permit contains no such conditions." 46 F.3d at 165. In fact, at trial petitioner Dowling was unable to identify a permit with similar conditions out of the hundreds which had been issued for a period of three years prior to the trial.

requirements was in fact unreasonable, and therefore directed Dowling to issue a permit consistent with its order. Although Dowling did issue a subsequent permit, respondents were of the opinion that the latter permit was inconsistent with the state court order, and therefore filed a motion to hold Dowling in contempt. Three days prior to the hearing on the motion for contempt, Dowling issued a permit which imposed only the standard $35 fee and excluded the special conditions he had earlier sought to impose. Thereafter, approximately three and one-half months after they sought to receive water, respondents were connected to the public water supply.

Respondents later filed this action in federal district court, pursuant to 42 U.S.C. § 1983, and alleged that Dowling's actions were violative of Respondents' rights to substantive due process under the Fourteenth Amendment. Following a jury trial, the finders of fact answered a series of special interrogatories in finding for the respondents. *See* 46 F.3d at 166. Specifically, with respect to the relevant time periods, the jury concluded that petitioner Dowling rescinded the initial permit, and placed unreasonable burdens on the subsequent permits, for the explicit and improper purpose of depriving respondents of a water supply as a means to compel the respondents to convey a portion of their land to the Town for no consideration.

The jury awarded compensatory damages against the Town and Dowling in the amount of $102,000 and punitive damages against Dowling in the amount of $9,500. Thereafter, the district court awarded $48,276 to respondents as attorney's fees pursuant to 42 U.S.C. § 1988.

Following the entry of judgment, petitioners appealed to the Second Circuit on various grounds. In affirming the judgment in its entirety, the Second Circuit rejected petitioners' arguments that: (1) respondents had no constitutionally protected property

interest; (2) assuming a property interest, respondents were only entitled to procedural, rather than substantive, due process protection; (3) petitioner Dowling was immune from damages based on qualified immunity; (4) that the award of damages was improper; and (5) that the award of attorney's fees was improper.

After application of the Second Circuit's entitlement test to the question of whether respondents were afforded substantive due process protection, the court below determined that respondents had a property right to the excavation permit and that substantive due process protected respondents from being "compelled to convey some of their land in order to obtain utility service." 46 F.3d at 169. The court below additionally held that Dowling, as a matter of law, was not entitled to qualified immunity. *Id.* ("Regardless of any doubts as to whether his conduct violated due process, Dowling could not have believed, as a matter of equal protection or simply of the laws of the town, that he had discretion to deny an excavation permit to the Walzes as a means of extorting land from them").

The court below likewise rejected petitioners' claims that the damage award was improper and excessive. With respect to the award of attorney's fees, the Second Circuit reviewed the record, mindful of *Hensley v. Eckerhart,* 461 U.S. 424 (1983), and determined that the award of attorney's fees was reasonable, "both in terms of the hourly rate and the number of hours expended on the litigation." 46 F.3d at 170. With specific regard to petitioners' assertion that the district court erred in deciding the attorney's fees without an evidentiary hearing, the court below, citing *Hensley,* noted that "awards of comparable size are routinely made without an evidentiary hearing," *id.*, and rejected petitioners' argument. Petitioners' motion for rehearing was subsequently denied by the court below.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S HOLDING THAT RESPONDENTS STATED A CLAIM BASED ON A SUBSTANTIVE DUE PROCESS VIOLATION WAS CORRECT AND NOT IN CONFLICT WITH PRIOR SUPREME COURT PRECEDENT.

Petitioners' position that there is "no such thing as a substantive due process protected 'property right' " is in conflict with well-established Second Circuit precedent and represents a question which this Court has appropriately declined to review in the past. *See RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989). In light of the factual record presented in this case, and more particularly the specific findings made by the jury after trial, the Second Circuit's well-reasoned rejection of each of petitioners' claims on appeal offers no compelling basis for this Court to grant the petition. In addition, insofar as this case is concerned, petitioners' assertions regarding the "far-reaching" nature of the Second Circuit's decision and an alleged conflict between the circuits are seriously misplaced.

The Second Circuit's approach to the respondents' claims was premised upon the "well-developed property interest analysis," *Walz v. Town of Smithtown, et al.*, 46 F.3d 162 (2d Cir. 1995), which itself stems from this Court's reasoning in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In that connection, the Second Circuit has consistently applied the "clear entitlement" test to questions of protected property interests in the area of land regulation and zoning. *See Walz*, 46 F.3d at 169; *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir.), *cert. denied*, 502 U.S. 907

(1991); *RRI Realty*, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989); *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988); *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985).

In examining the claims brought by respondents, and in accord with the authority cited above, the Second Circuit determined that petitioner Dowling possessed "no discretion [to] void the permit, or to refuse to issue another permit." 46 F.3d at 168.[4] Despite petitioners' claim that the Second Circuit misread the local Code in question, the language of the Town Code speaks for itself and clearly mandates that, upon compliance, a permit shall be issued. 46 F.3d at 168. Thus, petitioners' claim that the various requirements which the Code imposes upon such applications implies a degree of discretion to the issuing authority is incorrect and of no moment in this case, given the jury's findings and the fact that respondents' applications were in compliance. In short, although petitioner Dowling may have been permitted to impose certain reasonable restrictions, he clearly had no authority to deny the permits outright and deprive respondents of water service.

To the extent that petitioners may be heard to argue that the Second Circuit's holding is at odds with the law of other circuits, it must be pointed out that even were some articulable need for guidance from this Court regarding the jurisprudence of substantive due process, this case is clearly not the proper vehicle for such a review. In short, given the record in this case, and despite differences in the applicable standards, the facts

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4. It is worthy of emphasis to repeat that, aside from the lack of discretion in the applicable Code, the jury specifically determined that petitioner Dowling's motive for voiding and denying the permits was to improperly compel the respondents to deed a portion of their property to the municipality for no consideration.

underlying respondents' substantive due process claim would surely state a cause of action in the circuits. *See DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell,* No. 93-5301, 1995 U.S. App. LEXIS 9820 (3rd Cir. May 1, 1995) (holding that "in the context of land use regulation . . . a land-owning plaintiff states a substantive due process claim where he or she alleges that the [municipality's] decision . . . was arbitrarily or irrationally reached"); *Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810 (4th Cir. 1995) (applying protected property interest analysis to claim of substantive due process violation in zoning context); *Pearson v. City of Grand Blanc,* 961 F.2d 1211 (6th Cir. 1992) (holding with respect to substantive due process claim that plaintiff must show that "there is no rational basis for an administrative decision").

Petitioners rely upon the Eleventh Circuit decision in *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), *cert. denied,* 115 S. Ct. 898 (1995), in support of the general proposition that substantive due process protection should not be extended to new areas, which is not the case herein in any event. However, *McKinney* involved a case of public employment, which triggers very different concerns than does the issue of a protected property right relating to an individual's actual property. *See, e.g.,* 20 F.3d at 1560 (noting that a section 1983 suit by a terminated employee bypasses available state remedial procedures).

Moreover, the Eleventh Circuit explicitly noted its view that there are viable substantive due process rights for certain "actions that can not be countenanced." *Id.* at 1560 n. 15. In light of the findings of fact present in the record in this case, respondents submit that they would maintain a viable cause of action even in the circuits which apply the most restrictive standard to substantive due process. Therefore, while mindful of this Court's reluctance "to expand the concept of substantive due process," *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992)

(citation omitted), the facts presented herein fit safely within the parameters of the intention of the Due Process Clause " 'to prevent government from abusing [its] power, or employing it as an instrument of oppression.' " *Id.* at 126 (*quoting DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 196 (1989) (further citation omitted). In sum, the Second Circuit's decision clearly would not be the appropriate basis upon which to launch a review of such claims.

Petitioners' apparent claim that this Court's decision in *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994), mandates a "taking" analysis with respect to claims such as respondents' also misses the mark. The plaintiff in *Dolan* brought the case under an uncompensated taking theory pursuant to the Fifth Amendment, *id.* at 2315-16, and therefore this Court had no reason to apply a substantive due process analysis. Certainly, *Dolan* cannot be read to prohibit substantive due process claims in this context. Furthermore, even if the plaintiff in *Dolan* had asserted a violation of substantive due process, the discretionary nature of the variances sought therein would not in all likelihood rise to the level of an entitlement under the Second Circuit standard which emanates from *Roth. See RRI Realty,* 870 F.2d 911 (2nd Cir.), *cert. denied,* 493 U.S. 893 (1989).

Petitioners' reliance upon *Albright v. Oliver,* 114 S. Ct. 807 (1994), in support of the proposition that substantive due process may not be relied upon in the factual scenario presented by this case is likewise suspect. In *Albright* this Court's reasoning focused on the fact that the plaintiff therein, a criminal defendant, could have based his claims on specific protections afforded him by the Bill of Rights. In that regard, the majority did not rule out the application of substantive due process to deprivations of property interests. Indeed, Justice Scalia's concurrence appears to underscore the Court's focus on the states' criminal processes. 114 S. Ct. at 814 (Scalia, J., concurring).

Furthermore, to the extent that petitioners may be heard to argue that the Second Circuit's *Roth*-based entitlement analysis is called into question by *Albright,* or that substantive due process cannot protect state-created property rights, either argument is unavailing in light of the Second Circuit's decision. The court below specifically noted that "even if what is at stake is the Walzes' property interest *in their land,* that analysis would not . . . alter the outcome in the instant matter. As landowners, the Walzes surely had a right not to be compelled to convey some of their land in order to obtain utility service." 46 F.3d at 169 (emphasis added).

Both as a matter of law, as well as with respect to the factual findings of the jury, the opinion of the Second Circuit below was well-reasoned and well within Supreme Court and Second Circuit precedent. Petitioners' assertion that the decision below is of "far-reaching" effect is somewhat disingenuous given the fact that it was petitioner Dowling's extraordinary actions which gave rise to respondents' cause of action. Certainly, the jury's finding that petitioner Dowling intentionally withheld the necessary permit, with the knowledge that the respondents were without water, for the explicit purpose of compelling the respondents to deed over land to the Town strongly undercuts petitioners' insistence that the case will have an overly broad impact.[5]

In addition, petitioners' assertion that "this case is analogous

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5. Petitioners' argument that Dowling's conduct did not qualify as arbitrary, and that the question of his intent was unclear, is completely without merit. There was never any suggestion that Dowling's behavior was merely negligent. Moreover, petitioners' suggestion that Dowling's motive was proper or intended to serve the public interest is striking. Perhaps the most efficient response to petitioners' argument in this regard was given by the court below, which recognized that Dowling's conduct amounted to attempted extortion. 46 F.3d at 169.

to the situation where one property owner exacts a concession from another in exchange for the grant of an easement benefiting the other property owner" is particularly misleading. Brief in Support at 41. In actual fact, the Second Circuit's citation to this Court's language in *Dolan,* which suggests that the lack of a legitimate state interest in relation to a permit condition results in an " 'out-and-out plan of extortion' " is the more accurate assessment of the case. *Walz,* 46 F.3d at 169 (citing *Dolan,* 114 U.S. at 2317).

It also must be noted that petitioners' implicit suggestion that the Second Circuit misinterpreted the facts of the case is completely without merit. One need look no further than the jury's answers to the special interrogatories, 46 F.3d at 166, in order to ascertain that the respondents' claims were fully supported by the factual findings, as well as amounting to a substantive due process violation under the guiding precedents of the Second Circuit and this Court.

Finally, petitioners' reference to a finding by the district court that respondents possessed a protected property right to a water supply was in no way a basis for the Second Circuit's decision. Rather, the court below explicitly stated that addressing that issue was unnecessary, and therefore it played no part in the court's reasoning.

II.

THE SECOND CIRCUIT CORRECTLY HELD THAT PETITIONER JAMES DOWLING WAS NOT ENTITLED TO QUALIFIED IMMUNITY.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982), this Court reasoned that "[i]mmunity generally is available only to officials performing discretionary functions. In contrast with the thought

processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values and emotions." *See also, Ying Jing Gan v. City of New York*, 996 F.2d 522, 531 (2d Cir. 1993) (citing *Harlow*, 457 U.S. at 818 (1982)). Over a decade later, this Court had an opportunity to expand upon the "ministerial duty exception" to the doctrine of qualified immunity. In *Davis v. Scherer*, 468 U.S. 183, 196 n. 14, this Court noted its view that an official's breach of duty "would forfeit official immunity only if that breach gave rise to [a plaintiff's] cause of action for damages."

The court below correctly applied the ministerial duty exception to petitioner Dowling's assertion of qualified immunity. Despite petitioners' hollow attempt to demonstrate that the relevant Code afforded Dowling considerable discretion, the record speaks for itself. The Code states that, upon compliance with the identified requirements, an excavation permit "shall be issued in the name of the Superintendent of Highways of the Town of Smithtown." 46 F.3d at 168. As a factual matter, the Code does not give the Superintendent the discretion to impose unreasonable requirements or refuse to issue a permit for any period of time. Petitioners imply that the requirements which may be imposed amount to discretionary authority to withhold a permit, or void an already issued permit, both of which Dowling did. However, petitioners' argument sorely misses the mark. As the Code makes clear, and as the Second Circuit ruled, Dowling was completely without such discretion.[6]

It is likewise clear that the decision of the court below in no

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6. In point of fact, petitioners' argument collapses of its own weight when viewed against the actual facts. To the extent petitioners argue that Dowling had the authority to impose various special conditions, it must be remembered that he *issued* the original permit with no special conditions, and then voided it without articulating the need for any special conditions.

way infringes or alters this Court's precedents concerning qualified immunity. The conduct of petitioner Dowling was extraordinary, and the factual, objective circumstances surrounding his duty fully support the Second Circuit's view that "Dowling could not have believed, as a matter of equal protection or simply of the laws of the town, that he had discretion to deny an excavation permit to the Walzes as a means of extorting land from them." *Id.* at 169.

In sum, petitioners' argument regarding the proper rejection of the defense of qualified immunity by the court below is without merit and bespeaks no need whatever for review by this Court.

III.

THE SECOND CIRCUIT CORRECTLY HELD THAT THE DAMAGES AWARDED TO RESPONDENTS WERE NEITHER UNAUTHORIZED NOR EXCESSIVE.

Petitioners argue that the damages awarded to respondents "cannot be reconciled with this Court's . . . teachings . . . ." Brief in Support at 54. However, the Second Circuit's rejection of petitioners' attack on the award of damages represents neither an extension nor a deviation from this Court's precedents. In addition, petitioners' assertion that respondents offered no proof of "physical injury or suffering" completely misses the point. As this Court noted in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), " 'the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights' " (citation omitted). Respondents submit that the goal articulated by this Court in *Farrar* was achieved by the jury at trial.

As the court below found, respondents did present evidence

of emotional distress to the jury, which testimony the jury was certainly authorized to credit. Furthermore, substantial testimony was offered detailing the distress and discomfort suffered by respondents as a result of being without water for approximately three and one-half months. The Second Circuit's determination that the compensatory damage award should be affirmed was appropriate based on *Farrar* and well-reasoned Second Circuit precedent. *See Miner v. City of Glens Falls*, 999 F.2d 655, 662 (2d Cir. 1993); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993).

Petitioners additionally argue that the jury's determination of damages was "irrational". Without citing any persuasive authority, petitioners suggest that the award of approximately $1,000 per day was insupportable. Notwithstanding petitioners' assertion that "all that was proved was inconvenience," the Second Circuit pointed out that the damages awarded to respondents *included* compensation for "the inconvenience and hardship suffered by the Walzes because their home lacked running water." 46 F.3d at 170. The court below further noted that it had previously upheld larger awards for mental distress based on a constitutional tort, *id.*, and that the punitive damages award of $9,500 was not excessive.

In light of petitioners' failure to identify any contrary authority, and in view of the fact that the Second Circuit's precedents regarding damages are consistent with the guidelines supplied by this Court, petitioners' request for review of these issues should be denied.

IV.

THE SECOND CIRCUIT CORRECTLY HELD THAT THE AWARD OF ATTORNEY'S FEES WAS REASONABLE IN ALL RESPECTS.

In accord with their argument to the court below, petitioners challenge the district court's award of attorney's fees, pursuant to 42 U.S.C. § 1988, in the amount of $48,276. Although petitioners do not dispute that respondents qualify as prevailing parties under section 1988, it is nevertheless asserted that the application for attorney's fees was inadequate. However, despite petitioners' baseless insistence that the lower courts' holdings made a "mockery of all that this Court has said" with respect to fee applications, and despite petitioners' offensive allegation that counsel was "at the least, unethical,"[7] it is clear that the decisions of both the district court and the Second Circuit were fully supported by the applicable law and facts.

In compliance with this Court's holding in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the district court applied the familiar lodestar approach to the fee application. After reviewing the relevant factors, the district court determined that an hourly rate of $200 was appropriate. The Second Circuit affirmed that determination. The district court also reviewed the time records

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7. It was similarly argued to the court below that counsel's conduct was "unethical" with respect to the application for attorney's fees. As indicated above, the Second Circuit found the fee awarded to be reasonable both in terms of hours expended as well as the hourly rate applied. Petitioners' reiteration of the charge of unethical conduct to this Court, apparently based on the general amount of the award, leads respondents to point out that up to the filing of the instant petition, counsel for the petitioners had been paid $90,000 in fees. *Smithtown News*, Vol. 51, No. 7, May 11, 1995 at 21. When viewed in that context, petitioners' protestation regarding the alleged "simple, straightforward" nature of the case is somewhat disingenuous.

submitted by counsel, and after excluding hours attributable to work done in connection with the Water Authority (against which respondents did not prevail), the district court calculated the fee and made a further reduction. In the course of its decision, the district court referred to, but did not individually consider, the twelve factors bearing on reasonableness. *See Farrar*, 113 S. Ct. at 575 (noting that a court need not recite the twelve factors bearing on reasonableness) (citing *Hensley*, 461 U.S. at 430 n.3). Clearly, the district court's determination of the fee award was properly undisturbed by the Second Circuit.

As to petitioners' argument that they were entitled to a hearing on this matter, the Second Circuit's rejection of that position was completely proper in light of this Court's admonition in *Hensley* that "[a] request for attorney's fees should not result in a second major litigation." 461 U.S. at 437. Even accepting that there could be an application for attorney's fees under section 1988 which triggered a right to a full blown hearing, as the Second Circuit found, petitioners offered no substance in support of their claim that a hearing was required. 46 F.3d at 170. Thus, petitioners' insinuation that the court below "misread" *Hensley* as not requiring a "fair opportunity" to contest attorney's fee applications misses the mark. The court below simply held that, given counsel's application and the district court's treatment of it, a hearing was unnecessary in this case.

In the light of these circumstances, petitioners' argument that the Second Circuit erred in relation to its affirmance of the attorney's fee award is without merit.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for a writ of certiorari should be denied.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1994

TOWN OF SMITHTOWN and JAMES DOWLING,

Petitioners,

-against-

ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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No. 94 - 1721

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INTRODUCTION

In this brief we reply only to certain of the most egregious defects in respondents' arguments in opposition to our petition for certiorari. As to most of what respondents argue in their Brief in Opposition we believe that such arguments were sufficiently anticipated and answered in our petition.

ARGUMENT

1. RESPONDENTS' FAILURE TO ESTABLISH THAT THEY WERE DEPRIVED OF A FUNDAMENTAL RIGHT.

Respondents' apparently believe it is sufficient in order to establish that they were deprived of a substantive due process protected property interest for them to argue as if they were all owners of the land owned by Mr. Walz and to treat the street opening permit which was sought by the Water Authority as if it were the equivalent of a building permit or other certificate directly affecting a landowner's right to use its land. Compare RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir.) (building permit), cert. denied, 493 U.S. 893 (1989), cited and relied upon at page 6 of respondents' brief.

In this regard, they ignore that in fact only Mr. Walz is claimed to have any ownership interest in this property. Equally significant, they ignore that this

permit did not directly affect how this property could be lawfully used. It pertained, in terms, only to whether the Authority could open up the Town-owned street.

Also, respondents ignore that in RRI Realty the court of appeals had held that the landowner-plaintiff in that case did not have a Fourteenth Amendment protected "property interest" in the permit there sought. See 870 F.2d at 912. It did not sufficiently demonstrate its "entitlement" to the permit sought. Id., at 918-20.

Beyond that, and far more important, respondents' argument is remarkable for its total failure to even attempt to reconcile their claim of a deprivation of a substantive due process protected right or interest with what this Court has said in decisions such as Reno v. Flores, 113 S.Ct. 1439 (1993), and Collins v. City of Harker Heights, Texas, 112 S.Ct. 1061

(1992), as to substantive due process simpliciter having to do with rights or interests that are "fundamental" or "basic." See Reno v. Flores, 113 S.Ct. at 1447. See also Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2804-08 (1992) (Joint Opinion of Justices O'Connor, Kennedy and Souter). Instead, respondents' strategy is to pretend that this is simply a traditional land use regulation case, which, as we have pointed out in the petition, it most certainly is not.

Respondents have not established, and in this Court they do not even claim, that they were deprived of any fundamental or basic human right. Nor, as we point out next, have they established, and indeed they do not here even claim, that they were deprived by the petitioners of any sort of "property" (see infra).

In thus avoiding, or seeking to

avoid, these questions which are so critical to modern due process analysis the respondents are, essentially, merely aping what the court of appeals (but not the district court) did in this case in refusing to address, to confront, the so clear implications for this case of this Court's most recent substantive due process precedents.

With all respect, this should not be tolerated by this Court. It invites both confusion as to what is the law and, ultimately, disrespect for this Court.

2. RESPONDENTS' FAILURE TO ESTABLISH ANY DEPRIVATION OF A PROPERTY RIGHT.

At a number of points in their Brief in Opposition respondents urge, speaking only very generally, that they were deprived by the petitioners of "their rights to substantive due process" (see respondents' first Question Presented; see also pp. 4 and 6). In addition, they point out that the court of appeals here

held that they were deprived of a "property interest." See id., at 5 and 6-7. However, respondents never clearly identify in their brief just what is the "property" of which they claim they were deprived. Indeed, in this Court they never come right out and claim that they were deprived of "property" by the petitioners.

Also, while in their Statement of the Case respondents note that the court of appeals held that they had "a property right to the excavation permit [sought by the Water Authority]" (Br., p. 5), in their statement of Questions Presented they appear to suggest that their claim that petitioners violated their "rights to substantive due process" is "based upon a deprivation of water supply service to their home" -- seemingly abandoning the holding of the court of appeals that they had a "property interest" in this permit,

and, by implication, appearing to revert to reliance on the district court's holding that the "property" they were deprived of consisted of their interest in obtaining new public water supply service.

This reluctance on the part of the respondents to specify the "property" of which they claim to have been deprived is understandable. As the court of appeals pointed out, the district court's holding that respondents had a substantive due process protected property interest in obtaining public water service was "novel" (see A10). It was also directly contrary to square holdings of two other circuits. See Mansfield Apartment Owners Association v. City of Mansfield, 988 F.2d 1469, 1473-1474 and 1476-1478 (6th Cir. 1993) (rejecting claim that plaintiffs were deprived of substantive due process by reason of municipality's termination of water service); Ransom v. Marrazzo, 848

F.2d 398, 411-412 (3rd Cir. 1988) (same).

Similarly, the court of appeals' holding that the respondents each had a substantive due process protected property interest in this permit sought by others so that those others could excavate in the Town-owned street is itself most difficult to accept. It is, as a matter of the ordinary meaning of language awkward. Compare American Heritage Dictionary of the English Language, definition of "property":

> 1. Ownership. 2. A possession, or possessions collectively. 3. Something tangible or intangible to which its owner has legal title. . . .

Such an "interest" has no analog in traditional common-law notions of "property." Compare Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2900-02 (1992). Nor does this so-called "property" bear any sort of economic or sociological or other functional resemblance to the newer forms of

"property" or "entitlements" referred to in Board of Regents v. Roth, 408 U.S. 564, at 571-72 and 576-78 (1972).

This "property" cannot be traded or spent or sold or given away. It is difficult to conceive how it could be "owned." It cannot be invested or, like a professional license, exploited for economic gain. Nor does it "entitle" its owner to any "benefits" or anything else. Rather, all that it does is to authorize the permit-holder to excavate in the Town-owned street.

Moreover, to the extent this "property" could be "owned" by anyone, the owner would not be the respondents, but rather the Water Authority. Also, to the extent respondents might attempt here to tie a claim of a "property interest" in this permit to the ownership of land, we would again note that this was not the theory upon which this case was tried or

argued or determined in the courts below, and, of course, neither Mrs. Walz nor Robert, Jr. has ever claimed to have any ownership interest in Mr. Walz's property.

Finally, the respondents have not pointed to any state-law "rules or understandings" which define or establish a permit such as this as either "property" or an "entitlement to . . . benefits" which belongs to them. See Board of Regents v. Roth, 408 U.S. at 577.

In short, this "property interest" -- which the respondents never identify in their brief -- is not like any other form of property of which we are aware. It is not "property" under New York law. It is not "property" in the sense that this term is used in the Fifth Amendment's Taking Clause. And, we submit, this permit is not "property" -- and most certainly not the respondents' property -- in the sense in which that term is used in the Due Process

Clause of the Fourteenth Amendment. Cf. Lucas, 112 S.Ct. at 2901, noting this Court's "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments."

3. RESPONDENTS' ADMISSION THAT THE PETITIONER DOWLING HAD DISCRETION WITH RESPECT TO THIS STREET OPENING PERMIT.

In response to our having quoted and relied upon the language of Section 245-16, subd. C of the Smithtown Code as vesting in petitioner Dowling discretion with respect to the issuance and/or conditioning of the street opening permit sought by the Water Authority, respondents argue, in part, that "although petitioner Dowling may have been permitted to impose certain reasonable restrictions, he clearly had no authority to deny the permits outright and deprive respondents

of water service" (Br. at 7). They also urge, at page 12, again without bothering to quote or discuss subdivision C, that "the Code does not give the Superintendent the discretion to impose unreasonable requirements or refuse to issue a permit for any period of time."

Implicit in both of these quoted statements is the recognition, compelled by the so clear language of subdivision C (see Petition at 4), that in fact this local law vests in the Superintendent of Highways very important responsibility and broad discretion to determine what are the implications of a sought permit for the "health and safety of the public" and whether there are any "additional improvements" which should be required or conditions which should be imposed as "necessary and appropriate for the health and safety of the public."

That such discretion might be abused

or erroneously exercised does not in any way detract from the fact that this is a grant of broad discretion which cannot properly be characterized as merely "ministerial." It was only by ignoring this Town Code language that the court of appeals was able to conclude that there was here an "entitlement" to this permit and that petitioner Dowling did not enjoy the protection of the defense of qualified immunity.

Those holdings were error. Dowling had discretion with respect to this permit. And the respondents in effect concede that he had such discretion.

CONCLUSION

For the reasons set forth here and in the petition this Court should grant the writ of certiorari to review the questions which are here presented.

Dated: May 24, 1995

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